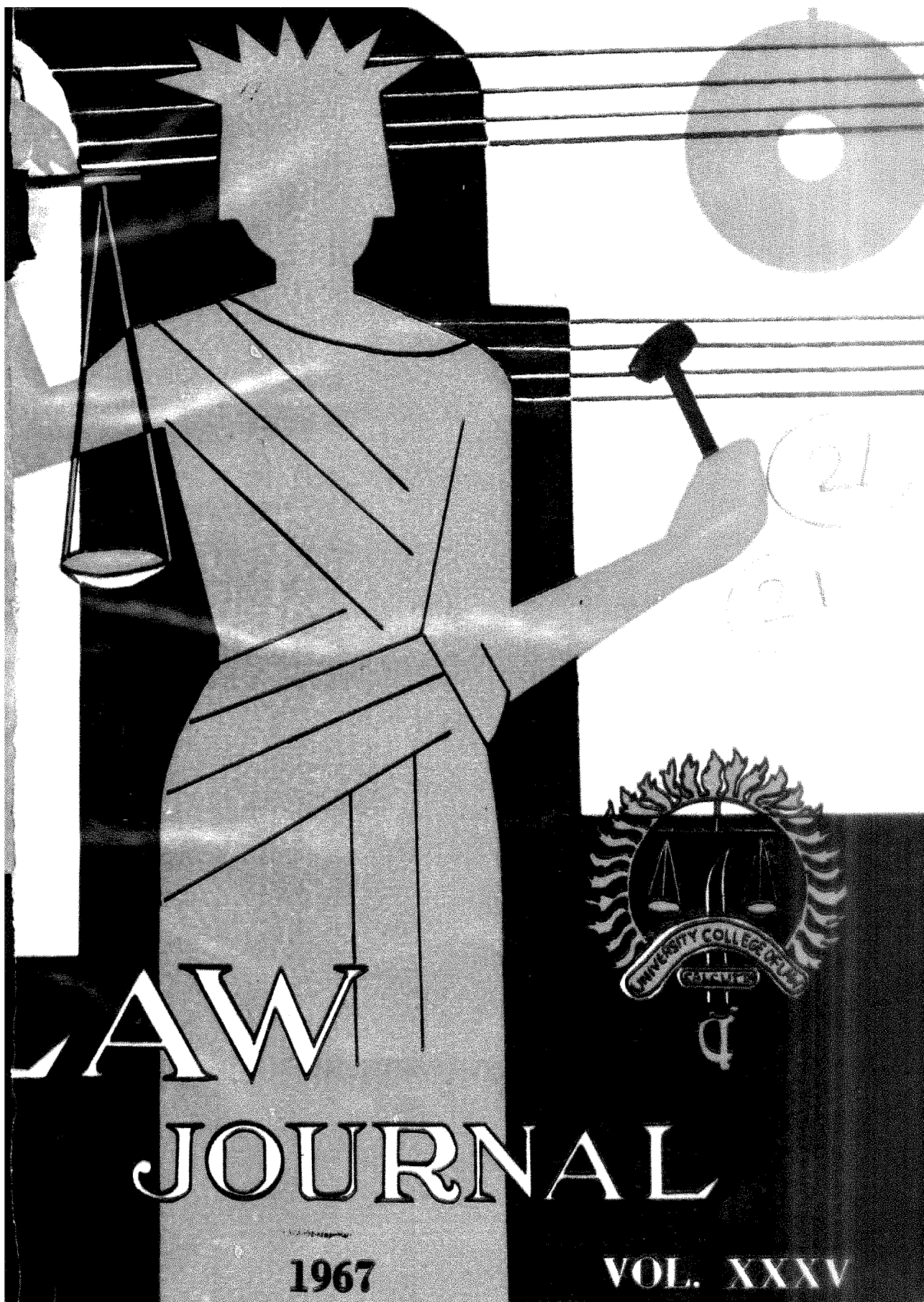
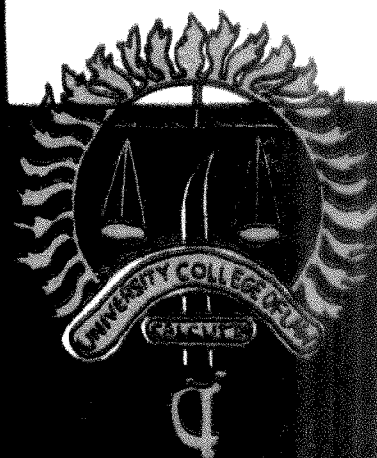




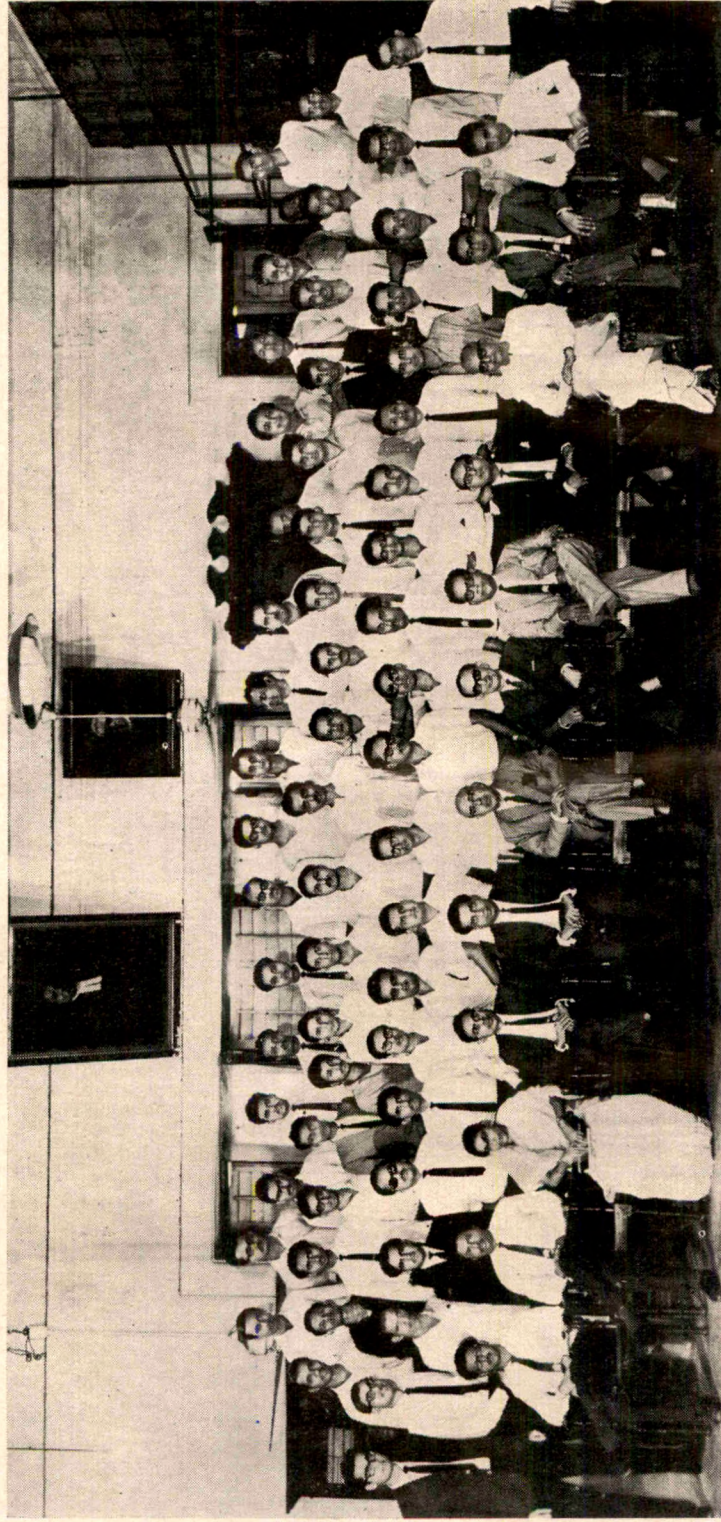
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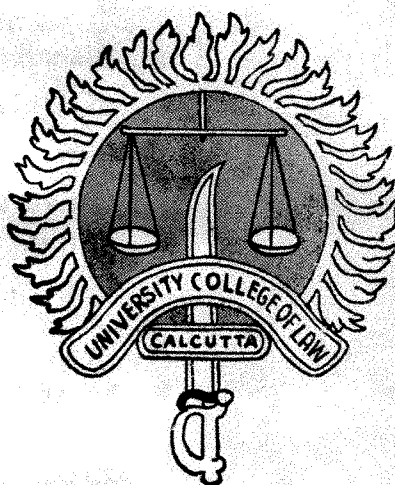
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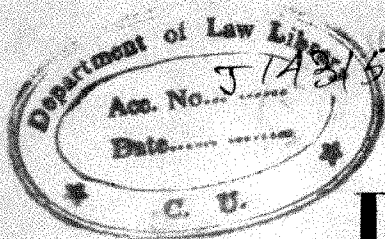


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Prof. AMALES K. MITRA, M.A., LL.B. (Cal.), LL.M. (Lond.),
Barrister-at-Law.

Editors :

BISHAN KUMAR GUPTA
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BISWANATH MUKHERJEE
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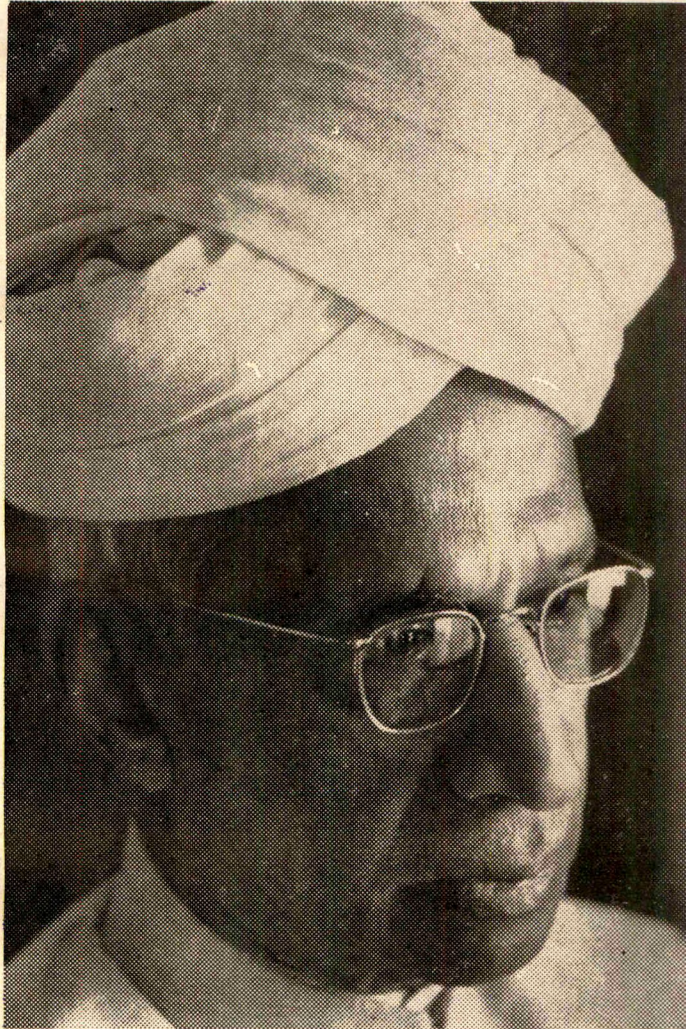
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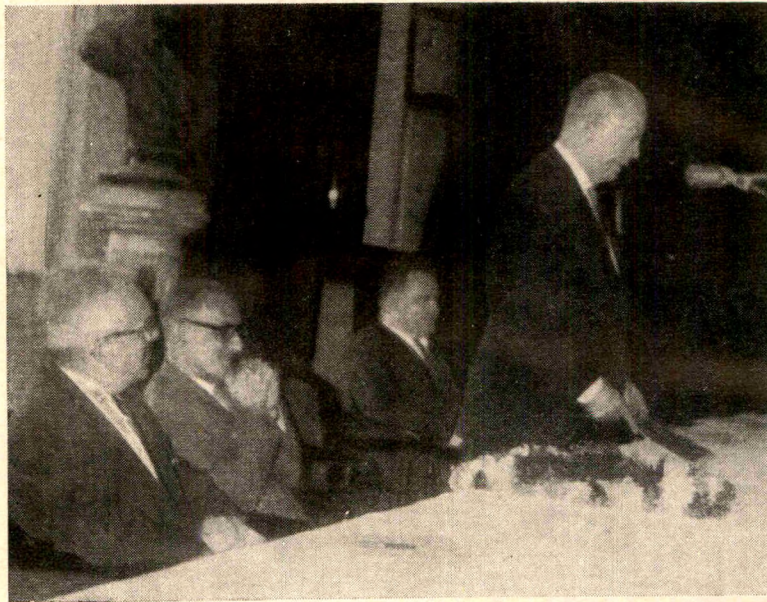
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Sd/- S. Radhakrishnan

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With Prof. Myers S. McDougal of Yale University, U.S.A., delivering lecture on Public International Law at our Library Hall

Our Ever-loving Superintendent



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UNIVERSITY COLLEGE OF LAW, CALCUTTA

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Editorial Comments

The present issue of the Law Journal at its 35th year has been enriched with articles contributed mostly by students and dealing with such matters which are of great importance to-day. The enthusiasm from the students was so great that at one point it seemed that this Journal could have been made out entirely on students' contributions. This is surely a healthy sign and a distinct improvement on the records of the previous years.

The articles, as the readers will find, dwell on Constitutional, Labour, Food and even Population problems of the present day, their impact on present society and legal implications. Besides, there are articles on Hindu Law, Criminal Law and on evolution of Socialist Law which will provide an interesting study of the subjects. The Law Reports include important cases dealt with by the International Court of Justice till date which will be of immense benefit to all readers including the students of International Law.

The whole of India has been enjoying some sort of holiday in so far as mass plans and programmes have been delayed for diverse reasons and we have none but ourselves to blame. This has started since April 1, 1966 when the 4th Five-Year Plan was scheduled to have commenced but was shelved. Almost all University examinations have been deferred from six to twelve months or so; all productions, be it industrial or otherwise, have slackened; and Law Journal also could not pull itself out

of the rut. It is the untiring effort and ardent zeal of Sri Amal Kumar De, the General Secretary of the Union in the first half of the session, amongst others which salvaged this Journal from a "total loss". Apart from this, this Journal should also put on record the valuable suggestions and help received from the Principal (offg.) Dr. B. N. Mukherjee and the Superintendent, Sri M. P. Basu. Still, an apology is due from the Editor's side to the student readers for such a delayed appearance of the Journal, needless although to remind them the age-old adage, "better late than never."

As Editor-in-Chief it is my unfailing duty to invite the attention of all the readers to the main events of the year as under.

1. CLOSURE OF THE UNIVERSITY SINE DIE

In the history of Calcutta University it was for the first time that the University had to be declared closed sine die due to the agitation by the students demanding amendment of the University Act. The authorities and the students stuck to their own grounds for three months and the University could not function during this period, thus creating inconvenience to everybody in the academic field before some solution was reached. The solution was apparent and could have been arrived at much earlier. Due to the ardent effort of our Union in particular, the law classes

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were not suspended though the College office could not function normally.

2. ADVOCATES ACT, 1961

Since passing of this Act, exemptions were given to Law graduates from undergoing any training under the State Bar Council upto the year 1965. It was then intended that this Act would take effect from the year 1966 and the Law graduates should undergo the proposed training under the State Bar Council and sit for the examination as directed in this Act. The Law graduates and students were not happy with the decision and they pointed out to the authorities in the State and the Centre the futility of the proposed training for one year after graduation and also of appearing at another examination to be held under the supervision of the State Bar Council. The agitation reached its peak during the current session and our students along with some graduate trainees resolved to stay-in strike in University campus for 24 hours; mass protests, demonstrations and procession both inside and outside the college were also held to strengthen the demands of the students. Their demand was to repeal the relevant sections of the Act so that the training and examination under the State Bar Council could not be given effect to. By dint of their relentless and strenuous efforts they succeeded in reducing the period of training from one year to six months and in excluding the viva voce examination at the end of their Advocateship training. Negotiations with the Law Ministry is still being carried on. Without commenting on the outcome of any decision therefrom it can safely be said that the students of our College maintained decorum and dignity worthy of their names, during those trying times.

3. FOURTH GENERAL ELECTION

On February 19, 1967 our country had its 4th General Election. The unique feature of this election is that it shows the emergence of a new India with a far more politically conscious mass, eager to hold the reins of administration through its own thinking and basing its decision on the achievement of the past. It is now proved beyond any shadow of doubt that any party to remain in power must prove its mettle by proper representation and solution of the diverse problems of the people. The constitutional provisions relating to Inter-State and State-Centre relations as well as the function of the Heads of respective Governments at State and Centre came up for interpretation by experts. With the reduction of one party's himalayan majority after the Fourth General Election, the opposition parties, in group or singly took over the reins of the government in most States in India and are trying to achieve a better record within the fetters of the Constitution of India. The result is that the provisions of the Constitution has now been put to an acid test. The happenings at Rajasthan, Madhya Pradesh and Haryana and the like are mere pointers of the events to come.

4. NEW PRESIDENT OF INDIA

Another marked feature of this year is the Presidential election held on May 8, 1967. Dr. Zakir Hossain was elected President by defeating Sri K. Subba Rao, the ex-Chief Justice of Supreme Court. It shows that India still desires a teacher to be its President as was also the case with our former President, Dr. Radhakrishnan. Dr. Hossain does not come from a very well-to-do family but through his sincerity and ability he has topped others in becom-

ing the first citizen of India. Teachers and students alike may take lesson from the life of this noble man and may emulate his example to reach the glorious peak of life.

5. DR. RADHA BENODE PAL

The sad feature of the year is the loss of the great son of the soil, Dr. Radha Benode Pal, on January 10, 1967. Dr. Pal was not merely a successful lawyer or a successful judge of the Calcutta High Court or the renowned Vice-Chancellor of the University of Calcutta or even India's National Professor of Jurisprudence; the distinction which made him unique is his honoured place among the few jurists of the world who are engaged in the study, application and development of public international law in the context of changing relations between world's sovereign States. He was a member of International Military Tribunal in Far East which sat at Tokyo from 1946 to 1948 for the trial of the alleged Japanese War criminals. Till his death he had been a member of International Law Commission. We are proud that in him India had a jurist of world stature. This journal contains a brief life sketch of this great intellectual giant and legal luminary of our times.

6. GHERAO

Another sad feature which looms large in the industrial field is the problem of gherao. Some enthusiastic Trade Unions wanted to test the gherao also as a legal fact. In our humble opinion gherao is a political fact which should not be questioned before the courts of law. Needless to say that the decision of the Calcutta High Court is of great importance on the point. Without making any comment on the legality of the matter, we may point out that in the past few months the emer-

gence of this "Trade Union activity" really posed a great problem to the industry, affecting production and the economy and well-being of the State as a whole. No doubt labour in our country is not yet considered an equal partner with the capital; benefits allowed to them are recorded as insufficient; the present legal provision regarding retrenchment, lay off, bonus payment are regarded as more 'management-oriented'. But Gherao as the "Direct action" method was sometimes used ruthlessly by the workers to fulfil their demands. Such actions definitely go against the present Penal provisions. However, time has come when one must pause to think seriously as to whether the existing labour laws need reconsideration and revision to effect some stability in the industrial field in the future or not.

7. SINO-INDIAN DIPLOMATIC RELATIONS

On June 13, 1967 Peking Radio announced the expulsion of two Indian diplomats namely, the Second and Third Secretaries of the Indian Embassy in Peking, on alleged charge of 'espionage activities'. They were ordered to leave within three days but before leaving, they were kept confined in the Embassy premises and assaulted by Red Guards. They were even tried in absentia by the People's Branch of the Peking Supreme Court and found guilty. As a precautionary measure Government of India retaliated by terminating the 'diplomatic status' of the First Secretary of the Chinese Embassy who was asked not to leave India without proper authorization. Enraged by such steps the Red Guards directed their attack on the Indian Embassy where the diplomats' families had moved. The Indian Government then ordered the confinement of the

personnel of the Chinese Embassy 'until further notice'. The whole affair commenced with a flagrant violation of the international law as evidenced by the general customs followed by the International comity of Nations or of the law as codified in Vienna Convention of 1961, relating to immunities accorded to Diplomatic Agents.

8. VIETNAM CONFLICT

The escalation of armed hostilities in Vietnam is engaging the serious attention of statesmen and scholars alike. The political as well as legal implications of the Vietnam question, which mainly centre round the provisions of the Geneva Agreement of 1954, are shrouded in confusion with different versions and interpretations, charges and counter-charges of aggression and their legal justifications. According to Mr. U. Thant, "the basic problem in Vietnam is not one of ideology but one of

national identity and survival of the Vietnamese people." The non-implementation of the provisions of the Geneva Agreement concerning general election to unify Vietnam, the systematic victimisation of and reprisals against former Viet Minh supporters and suppression of democratic freedoms are mostly responsible for the Civil War. The United States Military intervention in the civil war violates the principles of traditional international law, the Geneva Agreement and U. N. Charter. Mr. U. Thant suggested the unconditional stopping of bombing by the United States of America as a pre-condition for peace talks. But the stalemate continues and the fact remains that the Vietnamese are fighting in their own country and cannot be wiped out by bombs or missiles. The world public opinion appears to be mobilised in giving full liberty of action to Vietnamese for safeguarding their sacred rights to territorial unity, national independence and liberty.

—:—

A TRIBUTE

India suffered a great loss in the demise of Dr. Radhabenode Pal who passed away on 10th January, 1967 at the age of 81. He was the only Indian jurist to have attained an International stature. Dr. Pal was not only a successful lawyer, but also a Judge of Calcutta High Court, a Vice-Chancellor of the University of Calcutta and India's National Professor of Jurisprudence. During the last three decades he was a member of several legal or judicial bodies of international character, two of which may be specially mentioned. He was a Member of the International Military Tribunal for the Far East which sat at

Tokyo from 1946-48 for the trial of alleged Japanese War Criminals; and to the last day of his life he was a Member of International Law Commission, of which he twice became Chairman, once in 1958 and again in 1962.

Dr. Pal rose to the pinnacle of success from a most humble beginning. During his early years he had even to accept menial service for his subsistence. But through sheer hard work and sincerity of purpose he obtained his Master's degree in Mathematics and then in Law. Then University of Calcutta conferred on him a

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Doctorate in Law (LL.D.) for his thesis "Hindu Philosophy of law in Vedic Age and in Post-Vedic times".

He had the unique distinction of being appointed Tagore Professor of Law on three occasions, namely, 1925, 1930 and 1938. In January 1941, he was elevated to the bench as a Judge of the Calcutta High Court. He occupied this high office until July 1943. He then reverted to his practice at the Bar and in March, 1944 he became the Vice-Chancellor of the University of Calcutta, and occupied the office until 1946. Between April 1946 and December 1948, he acted as a judge of the Military Tribunal for the Far East, held in Tokyo for the trial of major Japanese War Criminals. By his dissentient judgment covering over 800 printed pages and the acquittal by him of Tojo, Hitaki, Shimodo and others he won international fame. That, by itself, might not make his judgment a great pronouncement but he also laid down propositions which have since passed into the body of public international law, though as a minority opinion and without a discussion of which no work on public international law would now be complete.

Broadly speaking, he held that no category of war, not even aggressive war, had yet become a crime in public international law and that there was no legal authority for victor nations holding a trial of some members of the vanquished at the conclusion of a war on charges of war crimes. He pointed out that if such authority was to be conceded, the prosecutor and the accused might well have had to exchange places, if the war had ended otherwise, i.e., in a victory of those actually vanquished. Writers on public international

law have since been at pains to counter these views, but in spirit of the weight of high authority on the opposite side, none has yet succeeded in meeting them adequately on grounds of reason and law.

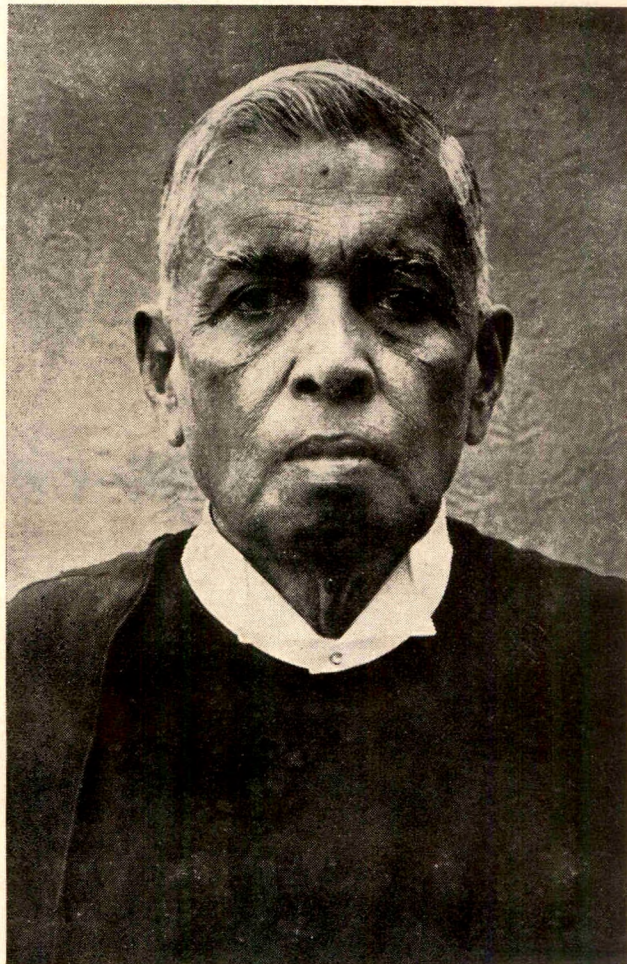
Dr. Pal became, in 1952, a member of the International Law Commission of the United Nations, of which he subsequently became the Chairman twice, which is a unique distinction. The President of India honoured him by conferring upon him the award of Padma Vibhushan. In 1959 he was appointed as the National Professor of Jurisprudence. Earlier, the Emperor of Japan conferred upon him the First Order of the Sacred Treasure. He was also granted the Freedom of the City of Tokyo and Kyoto.

Though richly endowed with academic honours and professional distinctions Dr. Pal remained, to the last days of his life a simple, quiet and unostentatious man, approachable by all and full of kindness and sympathy to anyone who came to him in trouble or pain.

No words will be adequate enough to express the loss the country suffered by his sad demise. His death was deeply and widely mourned not in India alone but by lawyers and jurists all over the world. But our sentiments can be better expressed by echoing what General Tojo, Japan's war-time Premier said shortly before his execution on December 23, 1948:

"Through him I felt pride for the Asian people. It would be fortunate if the recent war resulted in the understanding that *the peoples of Asia have the right to survival.*"

An Illustrious Son of Mother India



Dr. Radha Binod Pal

ON THE ISSUE OF ADVOCATES ACT



**A Part of the Assembly of Law Students & Graduate
Trainees of West Bengal in
University Lawn**

OUR STARS



**In Bengali (Female) drama who lifted Inter-Collegiate Drama
Championship Trophy for the first time in the history
of our College.**

The Role of the Judiciary in the Governmental Process

By THE HON'BLE MR. JUSTICE P. B. MUKHARJI

OF THE
Calcutta High Court,
Dean of the Faculty of Law,
Calcutta University

This will analyse the scope and limitations of judicial power, the role of the judiciary in giving continuity of life and expression to the Constitution and the relationship between the judiciary and the legislature and the judiciary and the executive.

WHAT IS A GOVERNMENTAL PROCESS?

The implicit assumption in the subject as stated has misleading connotation. The Judicial Process is not an ideology and methodology of a Governmental process. It has not the involvement of Governmental and Governmental Departmental processes. It has neither the bias, nor the commitment, nor the isolationism of a governmental process. In methodology, unlike the usual governmental process, it is not inquisitorial but accusatorial; it is not a soliloquy of the Government with itself on files and notesheets. It is a dialogue, very often a multilogue with divergent contending interests, attended with publicity, pronounced with publicly stated reasons, where canons of construction, tradition and precedents and whose

methods of investigation and sifting of facts are far more rigid and overwhelming than are those associated with what is narrowly and technically understood as Governmental process. The judicial process is a mentor, and where necessary, a censor of all other governmental processes. Governmental processes change with the change of governments. The judicial processes and the Courts, if they are to retain their independence, do not change with the governments. No doubt the judicial process and the Courts through which such process works are parts and creatures of the State and of its powers within whose aegis they work; they are nevertheless not in the usual sense administrative adjuncts or a part of the government or the governmental process. The judicial process though itself not a governmental process in the usual accepted sense, yet controls and corrects governmental and administrative processes.

SCOPE OF JUDICIAL POWER

Judicial Power is a concept of many dimensions, operating at diverse levels. It is difficult to define and eludes the grasp of neat logic and formal categories. As a

study in contrast, it is pitted against executive and legislative powers. As a study in methodology, it is the whole process of adjudication and decision. As a process of finding facts and truth under the din and debris of tensions, contradictions, conflicts, assertions and denials, the judicial power employs its own technique of evidence, procedure, examination of witnesses, opportunity of hearing contending views and versions. As a mission, it seeks and tries to do justice. Its great merit is that it is a power without bias or previous commitment and is a function of balancing interests. This power is both instinctive and dialectical.

The scope of judicial power expands or contracts according to the political philosophy or political science of the State within which the judicial power has to function. In totalitarian States with monolithic absolutism, the judicial power shrinks to the minimum and that minimum even works as the minion of political power. In liberal democracies the judicial power reaches its amplitude and Zenith. The judicial power is the barometer which registers the rise and fall of independence and freedom in human society.

Judicial power is directly concerned with disputes, rights and obligations between (a) man and man, (b) man and society, (c) man and the State or the Government and (d) States and States, or nations and nations. It extends over individuals, families, institutions, public and private corporations, companies, firms and associations and diverse kind of public and private relationships. Its impact is on life, liberty and property. It can punish, reward, encourage, compel, prohibit, direct, control, create and extinguish.

Judicial power can only be exercised through an actual *lis* or actual litigation. It is only through such a *lis*, it can be kinetic or else it remains static and potential. The Judicial power, unlike other powers in the State, has to be moved in every individual case. It cannot move by itself or in obedience to public clamour. It is moved by actions, proceedings, writs and methods of judicial review.

From this it follows that those who move the judicial power must act with some basic responsibility for a genuine public or private grievance. Attempt to move the judicial power for political or collateral purposes makes nonsense of statutes and laws and perversion of the Constitution and leads to waste of judicial power.

In liberal democracies, judicial power has travelled beyond its traditional home and environments. It has now an enlarged fourfold content in (1) decisions on constitutional controversies which are charged with political aspirations, (2) statutory interpretation by the Courts of many new types and patterns of legislation and statutes proclaiming unorthodox views of the service and welfare States, (3) Judicial review of laws and governmental action and (4) judicial review of not only the lower and subordinate judiciary but also of the diverse species of administrative and other tribunals and agencies. The vast and unprecedented growth of administrative laws has paradoxically increased the scope, content and impact of judicial power although their primary object has been to lighten the burden of the ordinary Courts.

While the Constitution has enlarged the scope of judicial power beyond their

orthodox limits, legislation in financial, fiscal and taxing areas, and in labour economic and technological areas has added new dimensions to judicial power.

III

LIMITATIONS OF JUDICIAL POWER

The limitations on judicial power are both extrinsic and intrinsic, though it is not easy to draw the line between the two. These limitations are not always fixed and may become variable.

The judicial power is not concerned with the policy of the law or the statutes which is said to belong to Parliament and legislatures. The judicial power does not formulate legislative policy but explains and propounds it by interpretation and construction. That is its first and paramount limitation.

Public movements and public controversies as such are not within the frame of reference of judicial power. It can only resolve an actual conflict between specific litigants and definite parties. It does not deal with the mass or the mob. It does not decide public grievances but decides specific complaints. That is its second limitation.

The judicial power is always *ex post facto*. It intervenes after the event and even in *qua timet* actions. It is in its nature archaic because it decides a past act or event. It is therefore neither messianic nor prophetic. It cannot anticipate. It is emblematic and symptomatic. Without a particular emblem or a specific symptom, it is powerless. It is necessarily occasional in its very nature and not perpetual in its current. That is its third limitation.

Judicial power operates *inter partes* and acts in *personam* and in the very limited spheres such as status and testament where its voice is in *rem*, it is at best a personal proclamation and not a public fiat for general application. *Res judicata* silences parties and their representatives but not those who are not parties. This is the fourth limitation.

(A)

The judicial power not only creates law but is created by it. It is itself the creature of law and statutes and is therefore bound by their terms and conditions. As part of such law, judicial power is normally bound by its own precedents and stark decisions. This is the fifth limitation.

The judicial power also accepts the limitations of the well-settled principles of natural justice and its own machinery and processes of discovery, investigation and evidence to find out truth and justice. That is the sixth limitation.

The judicial power is not political power and practical awareness of the difference between the two is a limitation on judicial power. The judicial power can only act on given materials and cannot create matter, event, or situation. Judicial power is therapeutic and curative. Political power is prophylactic and creative. The limitation of either is that the one should not usurp the function of the other. From this it follows that the political power is elective and represents the voice of the people. But the judicial power is non-elective and in that sense non-representative and reflects the conscience and not the voice of the people and acts more as a brake than as the Chariot. The judicial power is the guard and the control of the political power. It therefore does not act as the superlegis-

lature or the superexecutive or as the third estate but as the vital link and the dynamic harmoniser of the different organs and conflicts in the State, government, and society. This is its seventh limitation.

Judicial power is hierarchical and graded with original, appellate, revisional and superintending powers. They provide its own checks and balances and the judicial power accepts the limitations of its self-correcting processes.

IV JUDICIARY'S ROLE IN GIVING CONTINUITY OF LIFE

Though the judiciary acts spasmodically as and when an occasion arises, yet paradoxically enough by so doing it weaves the texture of continuity of life in State and Society.

Neither parliaments nor legislatures are permanent. They come and go at every General Elections at periodic intervals. The judiciary is permanent. It is the standing symbol of continuity in the midst of flux. It does not depend on votes nor has to yield to the cry and craze of the mob and the passing hour. It is the eternal sentinel therefore of the continuity of life and the general custodian of law and order in society.

Statutes are disjointed. They are disjointed. They are often contradictory. They are topical and never thematic. They are therefore sectional, isolated and never total. It is therefore the necessary role of the judiciary to interpret and construe the divergent statutes to render law whole and continuous, by harmonising contradictions, by bridging the gaps of

isolation and by providing a continuous context and a consistent theme. The judiciary is thus responsible for maintaining continuity of life in law and legal order. Statutes are mere words. The judiciary gives them meaning and force in their actual impact on life. Parliaments and legislatures breed statutes but it is the judiciary which has the responsibility of bringing up and training that young breed into responsible, meaningful and effective family of mature legal adolescents, united to the common purpose of continuous service and welfare of the State and the Society.

The judiciary prevents the disruptive forces, both statutory and behaviouristic in State and Society and thus help in the continuity of life, habit and structure. An apparent sharp break created by statute throwing out of gear patterns of values, thoughts, conduct and action is made more bearable in their impact by a reasonable judicial interpretation to make the transition not only lawful but truly effective. The high tension current of passion that passes into the Statute in the turmoil of Parliament and legislatures is reduced to serviceable voltage for maintaining and illuminating the great continuities of life and thus justify the basic and primary claim of law to lend a reasonable certainty to life and its maintenance. Dangers averted are neither remembered nor recognised nor recorded. One day perhaps history will record on how many occasions and where the judiciary has brought nations back from the precipice of revolution, disorder and anarchy. The judicial mind, the training, the judicial methods of investigation and adjudication and in fact the whole judicial outlook help in this great task of maintain-

ing the continuity of life. It is helped in this process by the judiciary's regard for past precedents and a general reluctance to upset them, a comity between Courts, which in spite of conflicts, express surprising consistency and unanimity throughout the world and by its respect for tradition, history, forms and customs which have stood the test of time and by a rational obedience to *cursus curiae*. Of the three organs of the Government, the legislative, the executive and the judicial, the judiciary is the most conservative, the executive is the most diehard, the legislature is the most precipitous. The judiciary is not ashamed of this desirable conservatism for continuity of life and demands it as an indispensable postulate for a legally ordered society.

The judiciary has a discretion, sometimes large and sometimes limited and restricted, but is never without it. Very often it is to that discretion to which the judiciary turns when its conscience revolts at the undue exaggeration of expediency and emergency at the cost of norms. That discretion and its wise use help to maintain continuity and restrain disunity. The judiciary is the apostle of applied law and liberty and not like the rest theoreticians about legal freedom and legal philosophy.

The maintenance of continuity of life is not, however, its only function. It extends and enlarges the expressions of life, their content and limits.

JUDICIARY'S ROLE IN GIVING EXPRESSION TO THE CONSTITUTION

The Constitution is the supreme law of the land. All other laws have to conform

to the Constitution. All action, conduct, statutes, rules and orders have to be in conformity with the Constitution. The Constitution is the legal sovereign. It is the only frame of reference within which our world of law, government and administration has to function.

Prima facie the Constitution is liable to be interpreted in the first instance not only by each of the three organs of the Government, the legislative, the executive and the judicial but also, by every individual and person, because they have to act according to the Constitution. From that point of view there is no section of private and public conduct and administration which can claim any monopoly of exclusive interpretation of the Constitution. The Constitution is open to the constant and recurrent interpretation of the whole nation.

But the judiciary is the final interpretation of the Constitution. In case of conflict of views and doubts among the different interests in the nation, it is the judiciary which is the ultimate arbiter and the conclusive voice on the interpretation, scope and meaning of the Constitution. Of necessity that is so. Therefore judiciary's role in giving expression to the Constitution is supreme.

The doctrine has been variously expressed in constitutional jurisprudence. It has been said in America, the American Constitution is what the nine judges of the American Supreme Court think it to be. In India it has been said that the Indian Supreme Court and the High Courts are the guardians of the Constitution.

The legal and constitutional implications of this doctrine have many special

and normally unnoticed features. Judiciary is not only exponent of the Constitution. It is not so much the guardian of the Constitution as the arbiter of the disputes under the Constitution. There are many other areas, where the Constitution is being daily applied after an interpretation by the agency applying the Constitution and if such interpretation is accepted by the interest affected, the Constitution is given the expression by the agency without the intervention of the judiciary. Such area is much vaster than the area of disputed problems under the Constitution which come to the judiciary for final determination. It is necessary to emphasise that the Constitution is not necessarily and pervasively government by litigation and by the judiciary. Secondly there are many areas under the Indian Constitution which excludes the judiciary and the Courts from interfering or intervening. There the expression is given to the Constitution by the agency or the instrumentality charged with administering the excluded areas. Thirdly judiciary's final expression to the Constitution is always subject to the amendment of the Constitution on the point to overcome such judicial decisions. The history of the amendments of the Indian Constitution in the last seventeen years bears eloquent testimony to that fact.

These three limitations are therefore to be read into the constitutional doctrine of the judiciary giving expression to the Constitution.

VI RELATIONSHIP WITH THE LEGISLATURE

The correct relationship between the legislature and the executive has been a very vexed problem in constitutional jurisprudence.

The first principle to be observed is that the judiciary does not legislate and the legislature does not judge. The simplicity of this proposition conceals many unsuspected complexities. The Judges do legislate and that in an unobtrusive way. By interpreting Statutes and the Constitution and giving extended or restricted meaning to them, they perform the function of legislation, no doubt indirectly. Mr. Justice Holmes described this process as Judges legislating "interstitially". Similarly the legislature is a Court unto itself about its own rules and conduct within its own precincts, and regarding its own members. In that respect the legislators act as Judges.

The respective jurisdictions of the legislatures and the judiciary, being very close to one another, often lead to one overstepping the limits of the other. The competition for power between the judiciary and the legislatures recently reached a high water mark in the historic dispute represented by the Presidential Reference between the Uttar Pradesh Legislature and the Uttar Pradesh High Court, reported in A.I.R. (1965) SC 745. Parliament and legislatures do not always gracefully accept the judiciary nullifying their Statutes and Acts or giving a meaning to them contrary to their expectations. Judges are embarrassed when Statutes and Constitution are amended to overcome the effects of judicial decisions. The friction, therefore, between the legislature and the judiciary is frequent. One aspect of this friction is represented by the growing tendency in Acts and Statutes to exclude and restrict access to the Courts by the aggrieved parties.

Harmony between the legislature and the judiciary is fundamental for constitu-

tional peace and good government. It is not enough in constitutional law to separate the two in water tight compartments and to put up barriers and pillars to neatly describe their respective boundaries. They are no doubt necessary. But what is more necessary is an active and dynamic co-operation between the two. The new constitutional jurisprudence that the world awaits is not the 17th, 18th and the 19th century doctrine of separation as co-ordination and co-operation between the two. The desirable principle is based on the recognition of the doctrine that the legislation or law making is one whole process, that law is not to be found as a finished unalterable product manufactured on the anvil of Parliaments and legislatures, ready to be marketed to the nation, for consumption. It is rather the basic raw material or the wholesale product, to be fashioned for individual needs and retail use. The first part of this process is done by the legislatures and the second part by the judiciary. Conceptually there is no conflict and the variation is in the application. It is this total view of law and legislation which alone can bridge the gulf between the legislature and the judiciary. With the one there are passion, prejudice and parley, and with the other, reason, reflection and restraint.

VII

RELATIONSHIP WITH THE EXECUTIVE

The judiciary is functionally different from the executive. This functional difference distinguishes it from the relationship between the judiciary and the legislature. The judiciary and the legislature are functionally and ideologically akin though methodologically and operationally different.

The relationship arises when executive action and conduct or executive orders are challenged as violation of law or the Constitution, or vindictive, malafide, excessive or perverse. Necessarily it creates a climate of conflict. Because the executive is the manifest expression of Governmental power, it is here in this area the judiciary faces the direct challenge of Governmental power. In this challenge, the executive gets the advantage of being directly under the patronage of the legislature, whose party in power represents the focal point of the executive in the cabinet of ministers. The executive is dependent on and in that sense a part of the legislature but the judiciary is independent and outside both. The relationship therefore between the executive and the judiciary, is complex, delicate and acute. It is rendered more difficult by the fact that the executive has to act quickly, decide quickly, cannot afford to be placid and patient, consequently has to adopt rough and ready methods. The very opposite is the method of the judiciary, reflective, deliberative, patient and slow-moving. The judicial outlook and the judicial method have little in common with the executive outlook and executive methods. The nature of this radical difference has to be grasped clearly to discover a working hypothesis between the two, which will neither paralyse the executive nor introduce tyranny and affront to freedom, liberty and law.

The relationship in the modern age is heavily charged with explosive potentiality. Ever since the last two World Wars and the phenomenal advance of science and technology and methods of mass control, the executive power has been growing rapidly to large dimensions. Although this growth was encouraged by the direct patronage of the legislature, the

executive power has now become even a challenge to legislature, which finds it difficult, if not impossible to control the executive and its myriad manifestations.

With the growing complexity and volume of legislation, government and administration, Parliament has not the time, the equipment and the technical skill to cope with the work. This has led to the phenomenon of skeleton legislation. Such skeleton legislation is responsible for the growing power of the executive. It means that the Statute is passed in broadest terms, leaving it to the executive to fill in the necessary and important details. Extensive rule making power for implementation of such legislation is also granted to the executive. In fact it is the executive today which is now doing the most crucial and practical part of legislation. Parliament and legislatures are only producing the skeletons, but it is the executive which is putting all the flesh and blood to make them living. Much of this executive power is without effective control. Constitutional jurists and legal theorists have laid down ineffective maxims about Delegated Legislation and Subordinate Legislation theorising on the doctrine that the Statute must lay down the policies and the guides, which have remained more as paper theories whose practical application has produced little beneficial results. Equally ineffective has been the whole procedure of laying before the House of legislature, which does only lip service to the theory of Parliamentary control, and the whole doctrine of placing on the table has been criticised as a meaningless constitutional ritual.

The entire Administrative Law is really the creation of the executive. It has ac-

quired so great an importance today, that it has secured a safe place in modern jurisprudence.

The present problem of relationship between the judiciary and the executive now depends on the judicial control and judicial review of this increasing volume of executive legislation and administrative law. This growing relationship has produced a new phenomenon, the administrative tribunals, which are a half measure between the regular courts with their orthodox judicial procedure and executive mechanics of carrying out and implementing statutes and legislations. They represent a combination of judicial anachronism and modern executive ebullience.

The constitution writs are used to operate the judicial control and judicial review of executive actions and orders. But their inadequacy is represented by the defect that in most cases they are prevented from entering into the merits of the executive performance. This has led to the demand in certain quarters for a kind of administrative law and administrative courts on the lines and patterns operating in France as "Droit Administratif". Numerous tribunals have already sprung up on the Indian legal scene, such as the labour and the industrial tribunals, the income tax and company tribunals. A part of the judicial problem in this respect is now concerned with standardising the procedure before the administrative tribunals. The present variety of administrative procedures has been criticised as the despair of the aggrieved parties as well as the courts and the tribunals.

There is noticeable a tendency to give a blanket protection to executive action. It is not uncommon to find in modern Statutes and Acts making provisions to

say certain executive actions and orders are "final" and beyond the pale of judicial scrutiny. This is done usually in the name of "Emergency" or "Expediency". One feature on this point is to say that the satisfaction or the opinion of the executive is conclusive on the point.

Here as elsewhere the ideal is the harmony between the judiciary and the executive. The State cannot act without the help of either and the Government needs them both. What is needed is a mutual deference between the two. A judicial awareness of the practical considerations and exigencies of executive actions is a constitutional need. A hair splitting juristic imposition upon the executive will stifle the executive action. That judicial deference to the executive has to be evolved and means no more than appreciation of the condition in which the executive has to act. This however cannot mean that the executive can disregard the basic mandates of the policy and purpose of the statutes and legislations or the imperative commands of the Constitution of India. That deference is due from the executive to the judiciary. The efficacy of this doctrine will depend on the mutual wisdom, respect and appreciation between the two with conscious self restraint on either side. That alone can keep the ship of the State on an even keel.

VIII

THE ROLE OF THE INDIAN JUDICIARY IN THE LIGHT OF THE ABOVE

The Judicial Power has not been expressly vested in the judiciary under the Indian Constitution. That is in sharp contrast with the American Constitution.

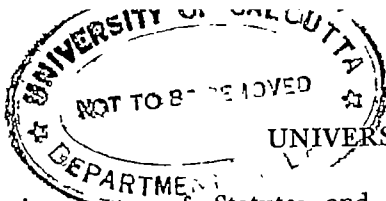
This creates a handicap for the Indian judiciary. Its constitutional consequence is that the judicial power is exercised not only by the judiciary but by other agencies and instrumentalities which have neither the judicial equipment nor the judicial training, nor the judicial climate to observe and follow the norms and principles of adjudication.

There is also no complete separation of the judiciary from the executive under the Indian Constitution. Therefore, there is the clearest Directive Principles of State Policy in Article 50 of the Constitution directing "the State shall take steps to separate the judiciary from the executive in the public services of the State". Some States in India, but not all, have done this in varying degrees. See in this connection the decision in *Nripendra Nath Bagchi vs. Chief Secretary of the Government of West Bengal*, reported in A.I.R. 1961 Calcutta 1, and affirmed on appeal by the Supreme Court reported in A.I.R. 1966 SC 447.

The general tendency of the Indian judiciary has been to uphold its own jurisdiction and powers and to extend them on the principle of "*Boni Est Judicis Ampliare Jurisdictionem*".

It has acted as the guardian and custodian of the Constitution and as the interpreter and arbiter of the constitutional rights and obligations. In particular, it has protected and defended the Fundamental Rights and the life, liberty and property of the citizens.

The Indian judiciary has held the scales of Justice evenly in most instances between the rights of man, the State and the Government.



As interpreter of Statutes and Acts, specially in the field of labour and social welfare legislation, it has taken a liberal and progressive view.

In its battle against the encroachment on the Constitution and the law it has reached high land marks. The 9th Schedule of the Constitution of India shows the long list of Statutes and Acts which the Supreme Court and the High Courts declared ultra vires the Constitution and struck them down as illegal and void. The incorporation of void and illegal Acts into the Constitution to make them constitutional is a striking proof of the failure of the Indian Legislation to conform to the Constitution under which it works. The recent controversy over the 9th Schedule of the Indian Constitution culminating in the decision of the Supreme Court in *Sajjan Singh Vs. The State of Rajasthan*, reported in A.I.R. 1965, SC 845 underlines the nature of the problem on this point.

The other land mark is the recent conflict between the judiciary and the legislature over their respective powers and jurisdictions in the dispute between the Uttar Pradesh Legislature and Uttar Pradesh High Court which became the subject of the Supreme Court's advice on the Presidential Reference reported in A.I.R. 1965 SC 745.

On the eve of the Constitution, the judiciary came into conflict with the executive over the problem of acquisition and control of property resulting in the amendment of Article 31 of the Constitution and its connected provisions, when Prime Minister Mr. Nehru attempted to warn the Judges in his speech in the Constituent Assembly on September 10, 1949 in the following terms:—

"We honour our Judges and respect their independence, but I warn them, we will tolerate no legal quibbles on their part, they must not stand in our way. No law, no Judge is going to come in our way in the abolition of the Zamindari system." The judiciary did not revise its opinion, but the Government amended the Constitution to overcome the judicial verdict.

I conclude with the following quotation from the "Aspects of Justice" by Sir Carleton Kemp Allen, Q.C. at pages 104-105 in the hope and belief that they apply equally to the Indian Judiciary:—

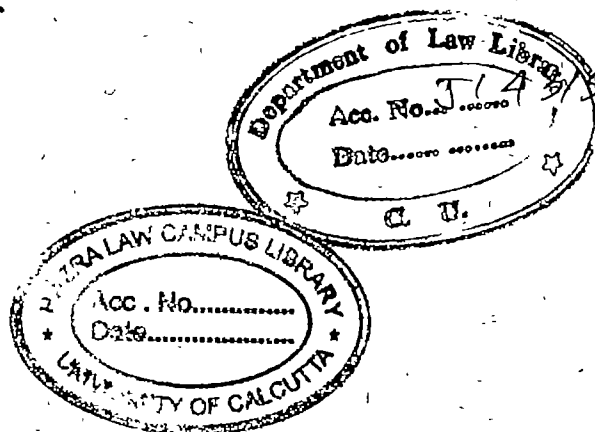
"This frequent judicial necessity causes impatience, not to say exasperation, to the apostles of pure expediency (which is often impure expediency). It has been evident in recent years in certain branches of English administrative law. Judges who from time to time administer a check to "policy" are reproached by the worshippers of policy with being incorrigibly narrow, conservative, and enslaved to the sanctity of private property. In the vast mass of English case law I do not believe that there is any adequate evidence that our judges have been antagonistic or disloyal to enlightened social policy, either in the development of the Common Law or in the enforcement of statutory schemes. But if sometimes they assert the principles of justice per se as against the plausible solicitations of immediate expediency, they are vindicating something which is of higher ultimate value than any ephemeral policy; and I believe that the vast majority of British public opinion supports them in so doing."

Amid the clamour of multiplying and contending interests, the quiet voice of the philosopher, reminding us of such elemen-

tary principles as justice and liberty, may teach us more wisdom and resolve more of our doubts than the statistician, the fact-finder and the whole teeming multitude of -ologists. Justice is, heaven knows, imperfect enough in its application, but at least 'it is an ever-fixed mark. That looks on tempests, and is never shaken'. It is the abstract mediations of the thinkers even more than the trials and errors of the doers, which help to keep that mark steady and to send its guiding beams across troubled waters; and for that reason it is from "unpractical" jurists like Stammler that illumination is still to be gained among the evergrowing complexities of social relationships.

Suggested Readings:—

1. Benjamin Cardozo—The Nature of Judicial Process.
2. Benjamin Cardozo—The Growth of Law.
3. Benjamin Cardozo—Selected Writings edited by Margarete Hall.
4. Lord Denning—Road to Justice.
5. Lord Denning—Freedom under the Law.
6. Justice Frankfurter—Of Law and Men.
7. Judge Learned Hand—The Spirit of Liberty.
8. Judge Learned hand—Collected Papers.
9. Jeremy Bentham & the Law—A Symposium edited by George W. Keeton and George Schwarzenberger.
10. Mr. Justice Robert Jackson—The struggle for Judicial Supremacy.
11. Justice—Josef Pieper (Faber & Faber).
12. The Public Paper of Chief Justice Earl Warren—edited by Henry M. Christman.
13. Sir C. K. Allen—Aspects of Justice.
14. Holmes Laski Letters published by Harvard University Press.
15. Harold J. Borman—Justice in Russia (Harvard University Press).
16. Vyshinsky—Soviet Constitutional Law.
17. Law in Action—Lord Asquith.
18. Sir C. K. Allen—Law and Orders.
19. Sir C. K. Allen—Law and Disorders.
20. Executive Discretion and Judicial Control (Hamlyn Lectures)—Prof. C. J. Samson.
21. Law and the Modern Mind—Jerome Frank.
22. Author's Articles on Delegated Legislation & Administrative Law published by the Indian Law Institute, New Delhi.



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Legislative & Executive Processes in Parliamentary Democracy and Growth of Administration in India

BY

DR. B. N. MUKERJEE, BARRISTER-AT-LAW.
*Principal (Offg), University College of
Law, Calcutta.*

Our Constitution begins with a Preamble that asseverates noble intentions based on lofty ideals. Though a period of 19 years is not long in the life of a Constitution which is meant to endure, it does take a substantial slice out of the life of an individual whose benefit is the ultimate justification of the Constitution. It is, therefore, time to descend from the heights of legal theory to practical results. If law is "social engineering", we ought to see that legal principles are actually laying our social foundation.

1. PARLIAMENTARY DEMOCRACY

(a) *Democracy*

Not only do the publicists and authors begin their discussion on 'democracy' with a reference to President Lincoln's speech at Gettysberg, to an ordinary citizen too the immortal line—"Government of the people, by the people, for the people"—seems to represent the source and inspiration of the concept of democracy. It is, however, common knowledge that this noble conception of democracy goes back to Cleon who, addressing the men of Athens, spoke of a ruler "of the people, by the people, and for the people", four hundred years before the birth of Christ.

Though the statement has stood the test of time in its entirety, the essential germ of democracy lies only in one of its parts, viz, "by the people". For, all forms of government are necessarily "of the people", and a benevolent Kingship can satisfy the requirement of "for the people" without being democratic. Government by the people in the modern sense means government by the majority of the people. Therefore, in a democratic state all citizens must have full political rights and form a vast electorate. But, in a society where there is only one political party, government by the majority of the people is quite compatible with an authoritarian regime. Therefore, government by the people, that is, by the majority of the people, may not in all circumstances result in democracy. A totalitarian form of government is a case in point. A genuinely democratic government must therefore possess certain other characteristic elements beyond being merely a "Government of the people, by the people and for the people". These characteristic elements are found in the distribution of State powers among different and independent organs in contrast to totalitarianism where all powers are concentrated in one organ or institution, thereby creating a legal distinction between those who command and those who obey. Demo-

cracy knows no such distinction; besides, there is always freedom and protection of the minority who may any day become the majority.

(b) *Parliamentary Form*

Having established the principle of distribution of Sovereign powers, democracy expresses itself in different forms according to the manner of this distribution. There have thus come into existence three different forms: Presidential, Directorial and Parliamentary.

Parliamentary form of democracy in India, as is well known, owes its origin to the British. In this form the Executive authority is shared by two organs of government: President (Head of State) and the Council of Ministers (cabinet), the latter being collectively responsible to the House of the People or in the case of a State to the Legislative Assembly. [Art. 75(3) & Art. 164(2)]. And as "there shall be a Council of Ministers with the Prime Minister (or Chief Minister) at the head to aid and advise the President (or Governor) in the exercise of his functions" [Arts. 74(1), 163(1)], the responsibility of the Government is complete.

The significance of this responsibility has, however, to be seen in proper light, bearing in mind that Indian Constitution aims at representative democracy and does not admit of any restriction on adult franchise, in a total adult population of some 180 million with a percentage of literacy below 24, and suffering from the twin chronic ailments of poverty and ignorance. In these circumstances, popular democracy is only publicised democracy; and responsible government means merely that the government in power has the legal right to govern. However, the Supreme Court has pro-

nounced that: "The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers of the Cabinet. The same provision obtains in regard to the Government of States. . . . In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part'."

2. NATURE OF EXECUTIVE POWER

The business of government involves a variety of processes. To an ordinary citizen, however, legislative and executive processes appear to be the most important and most intimately connected with each other. An analysis of the executive power itself would reveal the innate relationship that exists between the two. According to the judicial pronouncement of our highest court, executive power ordinarily connotes the residue of governmental functions that remain after legislative and judicial functions are taken away subject, of course, to the provisions of the Constitution or of any law. The Supreme Court has also attempted to give a more positive definition by stating that Executive function comprises both the determination of policy and its execution; initiation of legislation; maintenance of order; promotion of social and economic welfare; direction of foreign policy; and, in fact, the carrying on, or supervision of, the general administration of the State [Ram Jawaya V. State of Punjab, (1955) 2 S.C.R. 225 (235-6)].

Since the Declaration of Rights by the French Constituent Assembly in 1789, the doctrine of separation of powers has been given expression in the technique of con-

stitution-making. The protagonists of the doctrine, however, have always emphasized the intimate relation between executive-legislative powers. Jellinek even distinguishes between the executive element and the governmental elements of administration.

Sirdar D. K. Sen in his comparative study of our Constitution gives a fine analysis whereby executive power can be seen to consist of two distinct elements: legislative and governmental. While the governmental element comprises "executive powers properly so called" and includes all discretionary and mandatory acts pertaining to government, embracing the formulation of policies in both internal and external affairs, it is with the legislative element that we must concern ourselves to appreciate the close affinity that subsists between executive and legislative acts. This element has three distinct aspects: *first*, collaboration with the Legislature in law making, which under the present day condition takes the form of actual initiative in legislation; *secondly*, promulgation of laws in the form of executive regulation of two different kinds: one dealing with the relations between the State and its organs and agents, and the other of more general application establishing legal relations between individuals inter se, and between them and the State; and *thirdly*, enforcement of all laws which, according to Vittorio Orlando, must be done even by the application of external force.

3. RELATION BETWEEN THE EXECUTIVE AND THE LEGISLATURE

From this analysis of executive power it is clear that under our Parliamentary system there must exist not merely a blending of executive and legislative functions

but actually a relation of interdependence between the Council of Ministers and the Legislature. In this respect Indian system is more akin to the British than the American, which is founded on the theory of Separation of Powers. This interdependence finds expression in two opposing direction: control of Council of Ministers (Cabinet) by the Legislature (Parliament) and *vice versa*.

In modern times control of Legislature by the Council (Cabinet) has assumed an enlarged importance due to the growing strength of party organisations. In India the existence of only one political party of consequence in the country with its overwhelming majority in the Legislatures makes the controlling influence of the Council (Cabinet) practically absolute. The Legislature, having been deprived of its control over the Executive, has been endeavouring to make its sovereignty felt in another sphere. The Legal Committee of the U.P. Vidhan Sabha, for instance, arrogating to itself the power to consider the Supreme Court's opinion on presidential reference relating to the jurisdictional conflict between the Allahabad High Court and the U.P. Legislative Assembly, observed "that the Supreme Court Opinion did not reflect the real intention of the framers of the Constitution and was not binding on any one." [Statesman: Nov. 28, 1964]. Again, the Conference of Presiding Officers of all legislatures in India expressed unanimously against the majority decision of the Supreme Court and "reference was made to the fact that while the Supreme Court's opinion was by a majority, the resolution on the privileges and rights of Legislatures was adopted unanimously by the Presiding Officers." [Statesman: January 13, 1965]. This illustrates the vindication of 'democracy of numbers' over the doctrine of 'separation

of powers': an assertion of quantity over quality; and a sedulous undermining of authority of the Judiciary by the Legislature. It is not presumptuous to draw the attention of the blind followers of democracy to the fact that majority decisions in the Judiciary are reached through a process entirely different from that of the Legislature for its unanimity.

4. SEPARATION OF POWERS

Though the principle of collective responsibility of ministers is a negation of the doctrine of separation of powers, the Supreme Court in India has admitted that the conception of separation is implicit in the Constitution—*Ram Krishna Dalmia V. Justice Tendolkar*, AIR (1958) S.C. 538, *per Das C.J.* In fact, *in re Delhi Laws Act*, AIR (1951) S.C. 332 (346), Kania C.J. held that delegation of the *principle* of legislation is unconstitutional. The result of this coexistence of the two opposing ideas is a functional division, without institutional separation, of powers.

It was Montesquieu who gave currency to the threefold division of powers set forth by Aristotle. Separation of powers, according to Dean Roscoe Pound, has been carried furthest in the Constitution of the United States of America and the constitutions of its several states; and this was not solely due to the fashion of eighteenth century political thought.

The basis of the doctrine of separation is the juristic theory of the State in which the government performs only three types of function, namely, legislative, executive and judicial. The theory assumes that every act of the government can be placed under one or the other of these functions. But today the State renders many services which are difficult to be squeezed com-

pletely into any one of these accepted categories of function. In contrast with the past, the functions of the modern government, in Dean Pound's view, fall under two broad heads, viz., *social control* and *public service*, of which only the former can be conceived of as falling under the traditional categories. Duguit goes even so far as to think of all governmental functions as belonging to the latter class, and hence the juristic classification into *legislative*, *executive* and *judiciary* is quite irrelevant. The public services of the modern government, which are assuming daily a larger proportion of governmental activity, call for administration of governmental powers that defy classification. More often than not these administrations appear to belong to more than one department of the government; in other words they are mixed powers.

This brings the modern development of administration face to face with the ancient conception of the constitutional separation of powers. The conception of separation has already been, and is likely to continue to be, a serious obstacle to the development of administration owing to the intervention of the judicial process; unless the judiciary realises the importance of taking a flexible view of the doctrine of separation of powers in the vastly altered circumstances of the present day from the days of Aristotle or even the nineteenth century, when the jurists saw in the separation the radiant prospect of securing the liberty of the individual. The idea of the supposed promotion of efficiency by division of labour was also urged in support of the doctrine. But the all-embracing administrative process of today needs more co-operation than isolation; more functional integration than separation; and more exchange of specialised knowledges than their independent application.

When the governmental process of to-day is underlined by a rapid development of administration, the traditional conception of the separation of powers should play a subdued role. The adjustment between general security and individual liberty is to be reached by checks and balances of functional authorities. In any event, Montesquieu's enunciation of the doctrine of separation has been, says Sir Carleton Allen, widely misunderstood. To secure against a monopoly of power in the State, should be its main objective; and this is best achieved by widely distributing the total powers among many authorities exercising all the three functions, rather than by allocating the three types of power to different authorities in an exclusive sense.

5. GROWTH OF ADMINISTRATION

According to the 14th Report of the Commission, "The number of Indian statutes which constitute administrative authorities, purely administrative and quasi-judicial, is legion." The steady growth of administrative authorities in India after the independence is the consequence of transformation of the *police state* into a *welfare state* and has intimate connection with the rise of social legislation, such as labour laws, land laws, revenue and taxation laws, and also legislation relating to public utilities.

An administrative authority is an agency or limb of the Government other than its Legislature or Judiciary. All administrative acts are, therefore, referable either to the Executive or its agencies. Under our Constitution the Executive is free to undertake any measures in diverse spheres without, or in advance of, specific legislative sanction, except for incurring public expenditure or affecting private

rights of individuals. This was expressed by the Supreme Court in *Ram Jawara V. State of Punjab*, (1955) 2 S.C.R. 225 (236). Thus an administrative act may be statutory or non-statutory. Clearly enough a wide area of activities falls within the region of 'administrative action', which may partake of even legislative or judicial character. The legislative and the judicial acts of administrative authorities are known by the technical terms of quasi-legislative and quasi-judicial. Quasi-legislation is subordinate legislation of making rules and regulations to fill in the details in a legislative enactment for its execution. When an act of the administrative authority affects some one's legal rights and the law prescribes a procedure to be followed by the authority in coming to its decision, it is a quasi-judicial act. All other acts of administration are 'purely administrative' and are characterised by the fact that they are applicable only to particular cases without any generality, such as, the granting of a licence, making of enquiries and investigations preliminary to a legislative or judicial proceeding, referring a matter to a statutory tribunal for adjudication, etc.—*Musaliar V. Venkatachalam*, AIR (1956) S.C. 246 (266).

6. CONTROL OF ADMINISTRATION

In a welfare state and specially in a community with a socialistic bias all law, according to Wolfgang Friedmaun, becomes administration. Orders fixing prices of foodstuff or releasing foreign exchange or controlling traffic or enforcing zoning regulations are as much legislative as administrative. In fact, the main bulk of governmental process today is administrative process. Public legislation has all but ousted private legislation from the floor of legislature; and government today is the largest single litigant before the Courts.

Administrators legislate, adjudicate and exercise discretionary powers; and in their zeal for reform they look upon constitutional limitations and guaranteed rights as impediments in their way; and in their effort to get immediate results they do not hesitate to do violence even to the rules of natural justice. *Harla v. State of Rajasthan*, (1951) S.C.R. 299. Ministers with the best of intentions are, in these circumstances, "experts ex officio" in all subjects, including, of course, the knowledge of what is really good for the citizens.

"The essence of administration", says Friedmann, "is discretion and utility." Therefore, administrative actions must never be arbitrary, nor end in futility. For this, suitable control has to be devised to keep the administrative processes within bounds of reason that sees the individual's liberty in the fulfilment of social necessity.

The limitations on, and control over, the powers of administration are broadly divisible into two; legal and non-legal. We seem to have been preoccupied with the former to the utter neglect of the latter, which, though it exists in form, has never received the attention and care it deserved.

(a) Legal

The legal control springs from the principle that every action of the administration that interferes with the rights of individuals must be based on the authority of law and the Constitution. Our Courts, being the guardians of our Constitutional and other rights, have always been vigilant in protecting the rights of individuals to the annoyance of administrators. This is illustrated in a very recent case where the

Supreme Court held transfers of district Judges from one district to another by the Governor (of Assam) to be unconstitutional under Art. 233 (*A. B. Patrika*: 22-9-66).

Although judicial control of administrative action is not the subject of this paper, it may be mentioned in passing that it is possible to carry this method of control to an extreme resulting in an undue interference with administration, as happened in the U.S.A. in the last century. In India too the anxiety of the Supreme Court for the protection of rights of property against administrative action is evident in its interpretation of relationship of Art. 31(1) and (2) of the Constitution in the cases of *Chiranjit Lal*, (1950) S.C.R. 869; *Subodh Gopal*, AIR (1954) S.C. 92; and *Dwarkadas*, A.I.R. (1954) S.C. 119, leading to the 4th amendment of the Constitution in 1955. And even after the amendment the case of *Kochunji* A.I.R. (1960) S.C. 1080 drags in Art. 19(1)(f) and (2) to be tied to art. 31(1) so that the proprietary rights of individuals may be saved. Perhaps, the Judiciary has a natural tendency to confine administration to the minimum; and it has been rightly suggested that the Supreme Court of India still takes a narrow view of what the proper governmental functions are in a modern welfare state. [6 J.I.L.I. 175—J. Narain]. The real position may be summed up by saying that while the politicians and administrators, to quote from Pound, "went to one extreme and were bureau ridden", the lawyers and the judges on the other hand "went to the other extreme and were law ridden."

(b) Non-legal

Substantial functional control and reasonableness of administrative action

may also come from the non-legal side, an improvement of which would automatically reduce Court actions. The non-legal control has two aspects: political and administrative.

(i) *Political*: The political control flows from the principle of ministerial responsibility. It is secured by publicising the administrative actions so that there may be opportunities of criticism both inside and outside the Legislature. Sri Asok Chanda, with his experience as Comptroller and Auditor-General of India, suggested that the Deputy Minister, whose role was envisaged to be that of Parliamentary Secretary in the U.K., should be given the task of explaining policies of programmes to the general public and constituencies, and maintaining liaison with legislators, political parties and the press. Political ventilation of proposed action lets in the fresh air of public criticism into the fetid atmosphere of administration and cleanses administrative schemes of unreasonable arbitrariness.

(ii) *Administrative*: The administrative aspect of non-legal control is a kind of built-in mechanism, and controls administration from within. It has again two sides both of which demand our serious attention. The first is the bureaucracy itself; and the second is the outside participation in it. The word 'bureaucracy' has unfortunately come to mean something which it really is not. All bureaucrats are not necessarily bigoted; and administration needs bureaucracy. Although we delighted in running down bureaucracy during the British regime in India, it may make the conscientious among us sit up to hear Sri Asok Chanda say, "Since the advent of independence, there has unfortunately been a deteriora-

tion in discipline in almost all ranks of the Civil Services. This is reacting adversely on the efficiency of administration." After analysing with meticulous care the causes of this deterioration Sri Chanda sounds a note of urgency when he says, "It has become evident that a comprehensive review of the organization of the services should now be undertaken immediately to make the existing executive instrument better fitted to serve the needs of a welfare state. With the rapid expansion of functions of government and its new welfare orientation, we can hardly afford unnecessary and avoidable dissipation of man-power, while there is an acute shortage of competent personnel in the country.

Popular participation in the administrative process is another method by which the administration is brought in line with the reality of social forces. Advisory bodies of diverse types have thus emerged to assist administration in its all-embracing legislative, adjudicatory and executive functions. These bodies bring in citizens' psychology and expert knowledge to bear upon the administrative process, and encourage co-operation, conciliation, and compromise among group interests, thereby reducing the possibility of arbitrary actions. These bodies are either statutory, as the Advisory Board u/s. 3 of the Preventive Detention Act, 1950; or non-statutory, such as the Wage Boards which are being set up by executive order for tea, jute, cement, cotton, etc.

Participation of outside experts and ordinary citizens in the administrative process is certainly a healthy feature of democratic administration, provided the human elements involved display genuine interest in the subject matter and a sense

of responsibility commensurate with the importance of their task. While apathy of citizen-advisors delay the formation of the advisory bodies in some cases and render them moribund in others, the absence of responsibility and reckless use of advisory power bring disastrous results in a few instances. Thus in *Mannalal Jain v. State of Assam*, A.I.R. (1962) S.C. 386, where the Food Advisory Council in Assam advised the administrative authority to grant monopoly right for procurement of paddy, the Supreme Court observed, "Such a method will destroy the very basis of the rule of law and strike at the very root of orderly administration of law."

7. CONCLUSION

The independence of India marks a

fundamental change in the outlook of the government. What was a police state before, has with the introduction of the Constitution been transformed almost overnight into a welfare state with a phenomenal increase in administration. A rigid adherence to the "separation of powers" is no longer valid. The transformation places the newly introduced Parliamentary democracy in urgent need of a balance between the legislative-executive set-up and functions of administration. It is important to recognise that this striking of a balance cannot now be the exclusive function of the judiciary: political, bureaucratic and other non-legal processes are just as important. Above all, an active public participation in the evolving of administration is the necessity of the day.

The Changing Concept of Bonus

RABINDRA NARAYAN ROY, A.C.A.

(1st Year Law Student)

No proper industrial development is possible without a dedicated labour force. The labour and the management are the two most important ingredients in our productive system and unless the two co-operate, the long-term objective of rapid industrial growth is bound to remain unfulfilled. In order to utilize the labour force most effectively it is of paramount importance that labour should be kept contented and maximum goodwill should exist between the labour and management. In the history of the industrial disputes in our country, the disputes relating to bonus payments have always occupied a very prominent place. The long-standing labour disputes have always consumed much of the precious time and energy of our productive system to a great detriment of the social welfare and the wastage of the national wealth of the country. The records of industrial disputes reveal that in the majority of the cases the bonus dispute could not be settled amicably by conciliation process and the parties had to go for decision before the highest court of the country. One of the major causes of the frequent labour disputes involving bonus was the absence of any bonus legislation and the Full Bench Formula evolved by the Labour Appellate Tribunal in 1950 was being applied for solving the dispute before the passing of the present Act.

Another major cause of the frequent bonus disputes was the difference in the

concept of bonus from the standpoint of management and labour. A proper concept of bonus is a fundamental requisite before any dispute can be solved and principle for payment be laid down. Both labour and management viewed the bonus payments from different perspectives, each putting the other's interests at stake. Thanks are due to the labour of Bonus Commission which has now culminated into a bonus legislation and this has to a great extent succeeded in setting forth a concept of bonus in no uncertain terms.

Definitions of Bonus

The legislators have relieved themselves of much responsibility by not defining the term 'bonus'. The term 'bonus' has not been defined anywhere in the Bonus Act of 1965 or in the Industrial Disputes Act of 1947. The meaning of the term 'bonus' was elaborately discussed by their Lordships of the Supreme Court in *Muir Mills Co. vs. Suti Mills Mazoor Union*. In the course of the decision delivered in this case, several definitions of bonus were quoted from several sources, some of which are mentioned below.

1. The primary meaning of the word "bonus" as per the definition given in New English Dictionary is

'A boon or gift over and above what is nominally due as remuneration

and which is something wholly to the good.'

J. Stirling adopted this definition in *In re Eddystone Marine Insurance Co.* case.

2. Webster's International Dictionary defines bonus as 'something given in addition to what is ordinarily received by or strictly due to the recipient.'

3. According to *Corpus Juris Secundum* Vol. II at page 515 bonus means: -

'An allowance in addition to what is usual, current or stipulated, a sum given or paid beyond what is legally required to be paid to the recipient, something given in addition to what is ordinarily received by or strictly due to the recipient' 'It has been said to carry the idea of something uncertain and indefinite'

4. The word 'bonus' has however acquired a secondary meaning in the sphere of industrial relations. It is classified amongst the methods of wage payments. It has been used specially in the U.S.A. to designate an award in addition to the contractual wage. It is usually intended as a stimulus to extra efforts but sometimes represents the desire of the employer to share with his workers the fruits of their common enterprise. (vide *Encyclopaedia Britannica* Vol. 3 pp. 856).

5. In *Sutton vs. Attorney General*, the Earl of Birkenhead observed:

"The term bonus may of course be properly used to describe payments made of grace and not as of right. But it nevertheless may also include, as here, payments made because legally

due but which the parties contemplate will not continue indefinitely."

6. The same position was also recognised in *Kenicotit vs. Supervisors of Wayne Country*.

". . . . It is not a gift or gratuity, but a sum paid for services, or upon a consideration in addition to or in excess of that which would ordinarily be given."

To similar effects are observations in *Great Western Garment Co. Ltd. vs. Minister of National Revenue* and *National Association of Local Govt. Officers vs. Bolton Corporation*.

7. The Textile Labour Inquiry Committee defined bonus as follows:

"The term bonus is applied to a cash payment made in addition to wages. It generally represents the cash incentive given conditionally on certain standard of attendance and efficiency being attained." . . .

From the various definitions of 'Bonus' as quoted above it is obviously clear to the reader that there are two important ingredients in most of the definitions which may assist one in forming a correct concept of bonus. These elements are that (a) bonus is an extra payment in addition to wages and that (b) though it is not always legally payable still there may be valid reasons for such payments and once the payment is made it may assume the characteristics of a legally enforceable claim.

Earlier Concept of Bonus as Ex-Gratia Payments

Previously however, in India during the early part of the twentieth century, bonus was regarded more or less as a gratuitous

payment by an employer to an employee. This ex-gratia payment started in the Textile Industry in Bombay and Ahmedabad when in 1917, workmen were given 10% of the wages earned in the year. Similar payments were also made during the years 1919 to 1922 but it was never made clear that such payments were dependant upon the working of the previous year. In 1923, on the Textile millowners expressing their inability to pay any bonus there was a general strike. So this led the Government of Bombay to appoint a Bonus Dispute Committee to consider and decide the following:

(a) whether workmen had any enforceable claims either on customary, legal or equitable basis and (b) whether on the basis of profits in 1923 vis-a-vis the profits in 1917 and onwards, the employers were justified in not granting any bonus. The Committee concluded that workmen did not establish any enforceable claim and on the whole, the working of the cotton textile industries did not justify any payment of Bonus.

During the 2nd World War some bonus disputes were referred to adjudication under Rule 81A of the then Defence of India Rules. Even then Bonus was not considered as a legal right of workmen and it was awarded only on the principles of justice, equality and good conscience, with a view to keep the labour contented, in the interest of production.

Prevailing Concept of Bonus just before the Bonus Commission

However this way of looking at bonus purely from the humanitarian point of view could not continue for a long time. In 1948 in the case of Indian Hume Pipe

Company the Bombay High Court held that Bonus could be demanded by workmen as a matter of right.

In dealing with the concept of bonus, Supreme Court in *Muir Mills Co. Ltd. vs. Suti Mills Mazdoor Union* pointed out that: "There are two conditions, which have to be satisfied before a demand for bonus can be justified and they are (1) when the wages fall short of the living standard and (2) industry makes huge profits part of which are due to the contribution which the workmen make in increasing the production. The demand for bonus becomes an industrial claim. The basis for the claim is that labour and capital both contribute to the earnings of the industrial concern and it is fair that labour should derive some benefit if there is a surplus after meeting the aforesaid prior charges and it would be available for distribution of bonus."

So we see how just with the emergence of our country as a modern welfare State the concept of bonus changed from a mere ex-gratia payment to a legally enforceable claim of the workers provided certain conditions were fulfilled. The claim was based on two considerations: first, that labour was entitled to claim a share in the trading profits of the industry, because it has partially contributed to the same; and second, that the labour was entitled to the claim that the gap between its actual wage and living wage should within reasonable limits be filled up.

The claim of bonus assumed legal enforceability from the growing moral sense on part of employers to pay the workers living wages and from the general opinion that the labour's contribution to the production process contained many risks, prudence, efficiency and other human

elements similar to those of an entrepreneur and hence labour also ought to get a share in the profits along with the entrepreneur.

Whether Bonus amounts to Remuneration or profit sharing

In the case of *State Bank of India and others vs. Their workmen*, the Supreme Court considered two questions, namely, whether bonus is a wage or at least a remuneration for service rendered and whether it is profit-sharing.

The Labour Appellate Tribunal has explained the concept of bonus in the general concept of remuneration.

In a recent decision in *Workmen of Hercules Insurance Co. Ltd. vs. Hercules Insurance Co. Ltd.* it was held that bonus awarded under the Industrial Disputes Act is not a part of wages, but that the right to claim bonus which has been universally recognised by industrial adjudication in cases of employment falling under the said Act has now attained the status of a legal right.

Whether bonus is deferred Wages

In *Muir Mills Ltd.* case it was held that bonus was not deferred wages; because if it were so, it would rank for precedence before dividend. The dividends can only be paid out of profits and unless and until profits are made no occasion or question can also arise for distribution of any sum as bonus amongst the employees.

The Supreme Court in the case of *State Bank of India and others vs. their workmen*, considered the question elaborately as to whether bonus is profit sharing and came to the conclusion that it does take the form of a share in profit. "There can

be no doubt, however that profit bonus, in the industrial sense in which we now understand it, is a share in the profits of a company; it is labour's share of the contribution which it has made in the earning of profits."

The Court also accepted the definition of bonus as cash payment made in addition to wages as a stimulus to extra work and efficiency by labour. But to enable the labour to earn the bonus, the two conditions laid down in the *Muir Mills Co. Ltd.* case and as referred above had to be satisfied.

Therefore the concept of bonus prevailing before the appointment of Bonus Commission may be summarized as follows:

- (a) Bonus was regarded as a share of profits and a part of remuneration but not as deferred wages.
- (b) Bonus became a legal claim whenever either of the conditions of *Muir Mills Co.* case was satisfied.

Concept of Bonus as per Bonus Commission

During all these years after independence it has often been emphasized on behalf of the Trade Unions that as all the workers are morally entitled to the living wage, the shortfall in attaining the same must be made up by a share of the profits in the form of bonus. Art. 43 of our constitution lays down as one of the Directive Principles of State Policy that "the State shall endeavour to secure by suitable legislation or economic organisation or in any other way to all workers, agricultural, industrial or otherwise work, a living wage, conditions of work ensuring a de-

cent standard of life and full enjoyment of leisure and opportunities".

Bonus Commission however remarked that the spirit of Art. 43 would be defeated if the aims are attempted to be realised for a particular section of workers. Not only that the gap theory would imply that bonus would diminish if wages become higher and the level of living wages is reached. But it is often found to the contrary that higher bonuses are paid in those industries where the wages are higher.

Finally the Bonus Commission defined the concept of bonus as a legitimate share of the labour in the profits of a concern once the profits exceed a certain minimum. The Commission meant by the concept of bonus a share by the workers in the prosperity of the concern in which they were employed. Thus we see for the first time, an endeavour to link bonus only with the prosperity of a business unit.

But the new bonus legislation also had to take into consideration the question of shortfall in the labourer's living wages. If the bonus was just a sharing in the prosperity of a concern, then by parity of reasoning it follows that in case of trading loss the workers may not expect any bonus. But the new Bonus Act of 1965 provides for compulsory bonus payment. Now whether there is profit or not every employer shall be bound to pay a minimum bonus of 4% of basic wages or Rs. 40 whichever is higher u/s 10 of the Act. So it is evident that the Bonus Commission did not visualize bonus purely as sharing in the prosperity of a concern. The present day disequilibrium in the wage structure and the workers' living requirements in monetary terms prompted the legislators to provide for the minimum bonus

clause. Thus in reality, the New Bonus Legislation has culminated in upholding that concept of bonus which gives recognition to the fact that bonus in spite of being a share by the workers in the prosperity of the concern, also partakes the character of filling the gap in wages when the wages fall short of real wages.

Future trend in the concept of Bonus

The concept of bonus as laid down by the Bonus Commission and as envisaged by the new bonus legislation is consistent with the contemporary industrial climate. But with continuing improvements in production efficiency, management environment, profit-volume ratio and real earnings of the workers, the concept of bonus is likely to undergo a change from the present concept as has been noticed in the continent, U.K. and the States. In future the concept of bonus may be more linked to relative individual efficiency of the workers and a sense of equal partnership in production between the management and labour. The present system of bonus payment and the concept of bonus take it for granted that all workers contribute to the prosperity in equal measures, that there are no lazy or very efficient workers or that all the workers possess same degree of technical skill. The present system of bonus as per the dissent opinion of Shri Dandekar, a member of the Bonus Commission, gives vent to the lazy workmen's expectations of having something without much exertion in the form of annual profit bonus. So in days to come, the concept of bonus may not fail to take note of relative efficiency of workers and with the attainment of high living standard of workers compulsory payment of bonus may be done away with. Bonus will become more scientific and promote greater efficiency.

Table of Cases

1. In re Eddystone Marine Insurance Co., 1894 W.N. 30.
2. Great Western Garment Co. Ltd. vs. Minister of National Revenue, 1947 Ex. G.R. 453.
3. Hercules Insurance Co. Ltd. vs. Workers of Hercules Insurance Co., (1961) I.L.L.J. 249.
4. Kenicotit vs. Supervisors of Wayne County, (1873) 21 Law Ed. 319.
5. Muir Mills Co. Ltd. vs. Suti Mills Mazdoor Union, 1960 L.L.J. Vol. II, p. 586.
6. National Association of Local Government Officers vs. Bolton Corporation, 1943 A.C. 166 at p. 187.
7. State Bank of India vs. Their Workmen, (1960) 1 S.C.R. 200.
8. Sutton vs. Attorney General, (1923) 39 T.L.R. 294.

ON 'LABOUR'

It we rightly estimate things, what in them is purely owing to nature, and what to labour, we shall find ninety-nine parts of a hundred are wholly to be put on account of labour.

—JOHN LOCKE

For as labour cannot produce without the use of land, the denial of equal right to use of land is necessarily the denial of the right of labour to use its own produce.

—HENRY GEORGE in 'Progress and Poverty'

Labour in this country is independent and proud. It has not to ask the patronage of capital, but capital solicits the aid of labour.

—DANIEL WEBSTER

Evolution of Separate Property in Hindu Law

PROF. HARIS C. GHOSH, M.A., LL.M.

In the Vedic period the family, as a fundamental unit, was the foundation of social structure. In that early society properties were few in comparison with the number of population. Naturally there was constant need for satisfaction of wants. The wants were viewed as the wants of the family. The individual, apart from the family, was of no concern to the society. The demand was always for more property and wealth of the family. The constant prayer was: "Bring us a thousand cows, hundreds of kine, O hero, bring us cattle, bring us ornaments, bring us embellishments and steeds, give us besides two rings of gold" or "For goodly fields, for pleasant homes, for wealth we sacrifice to thee"(a). The effort was always for augmenting the common property and fund of the family. The scope for acquisition of separate property being very limited, the individual could not also live apart from the family on his own funds. The family lived together in a single house, supported by common property and the produce of the common land and the fruits of labour of all went to the common stock. In the absence of any real conflict between the interest of the family and that of the individual it became the common law that all properties, even if

acquired by any single member, were the properties of the family(b).

In the period of Dharmasutras, the beginning of which coincides with the rise of the Magadhan empire in the seventh century B. C., there was steady progress in society. Arts, crafts, industries developed and business was well on foot(c). All these gave ample scope for the acquisition of separate property by an individual. The active and adventurous members began to make free individual self-assertion and claim that property earned by their own labour and skill should be their separate property. The law reacted to this claim and reconciled the conflicting demands by a gradual recognition of the claims for separate property of the acquirer. The laws in this period and for centuries thereafter were primarily concerned with the Brahmins having the occupation of learning in all the branches of the Vedas, and only secondarily with the Kshatriyas and in a remoter degree with common people, the Vaisyas. The preponderance of the law relating to Brahmins in all the sections is an outstanding feature of these laws. Naturally, when the idea of recognizing separate property through self-acquisition was first conceived, the law was confined to certain

(a) M. A. Buch on Economic Life in Ancient India, pp. 8-9.

(b) Mayne's Hindu Law and Usage, 11th Ed., p. 310.

(c) Mayne's Hindu Law and Usage, 11th Ed., p. 310; Bose's Social and Rural Economy of Northern India, Vol. II, pp. 337-338.

earnings by learned occupation which was the special province of the Brahmins(d). Thus, Vidyadhanam was accepted to be an item of separate property which could be legally acquired by an individual apart from the family. That it was definitely one permissible item of separate acquisition in the early stage of the sutra period is clear from the following text of Gautama which is generally dated around 600 B.C.: "a learned coparcener may not, if he likes, give his self-acquisition to the unlearned ones"(e). The text meant the fees and honoraria of the Brahmin, earned by him as a priest and as a lawyer—both as a debator or a giver of opinion(f). There being no reference to any other item of property in this earliest sutra text, it is established beyond doubt that in the first stage vidyadhanam was the only item of property or earning which could be the object of individual ownership in law. All other items of property, even if acquired exclusively by an individual, belonged to all the members of the family including the acquirer.

by extending the law relating to separate property from Vidyadhanam to sauryadhanam (gains of valour) and saudayika (gifts by father). These three items of property could conceivably be the objects of individual ownership in accordance with the law as enunciated in the following text of Vyasa: "acquisition made by learning or by military prowess and gifts by father are the property of himself and cannot be sought by his co-heirs at the time of partition" (g). The law was then easily extended to further items of property like presents from friends, gifts at marriage and lost ancestral property recovered by one. All these six items were always the separate property of the acquirer. If a member of the family acquired other items of property even exclusively by his own exertions, he was only entitled to receive a double share in accordance with the latest law as stated in the following text of Vasishtha which is generally dated around 300 B.C.: "If any of the brothers has gained something by his own efforts, he receives a double share" (h).

Under the Nandas and their successors the Mauryas, the supremacy of the Magadhan empire extended far and wide. Art, craft, industry, business developed further and there was also an increase in the number of occupations which opened new opportunities for individual acquisitions. There was growing demand for further concessions and new adjustment of the conflicting demands of the family and that of the individual. The law reacted

In the period of Dharmasastras or the metrical smritis, which started roughly around 300 B.C. and continued right up to 700 A.D., industry, trade and commerce further increased under the Sungas, the Kanvas, the Satavahanas and the Guptas. The crafts and the professions including the doctors, the actors, the dancers etc. became numerous (i). The nature and scope of individual acquisitions also became numerous. The old rules giving a

(d) Sen-Gupta on Evolution of Ancient Indian Law, p. 216.

(e) Gautama, XXIX. 30.

(f) Jayaswal on Manu and Yajnavalkya, pp. 267-268.

(g) Vyasa quoted in the Dayabhaga, Chandicharan's Ed., p. 163.

(h) Vas., XVII. 51.

(i) Cambridge History of India (First Indian Reprint), Vol. I, p. 428; Jayaswal on Manu and Yajnavalkya, p. 61.

list of specific items of property which could be the objects of individual proprietary right and the provision for only a double share in other items of property earned by individual exertion were found to be insufficient to meet the growing economic demands of the individual. The joint family which continued to dominate the social structure of the Hindus was under severe pressure and was constrained to accept the rule that could be dissolved at the will of the members who composed it (j). To save the joint family from disintegration new adjustment of the demands of the individual with the demands of the family was inevitable and this led to the formulation of a wider general rule which recognised greater freedom of individual acquisition of separate property. It became the rule that in addition to the specific items of property which could become the objects of separate property, the individual could also retain as his own any property which was acquired by his own effort without detriment to family property, that it was definitely the law of the period is evidenced by the following text of Manu which is generally dated 150 B.C: "whatever is acquired by the labour of one without detriment to paternal property, that, if acquired by his own efforts and desired by him, he ought not to give to his co-heirs except at his own will" (k). This continued to be the living law for centuries when the text of Yajnavalkya, which is generally dated at about 150 to 200 A.D. restated and reaffirmed this law in the fol-

lowing manner: "Whatever is acquired by a person himself without detriment to the father's estate (as well as) presents from friends, and wedding gifts shall not belong to co-heirs. Nor shall he who recovers lost ancestral property nor what he acquires by learning give it to his co-heirs" (l). This text of Yajnavalkya according to its tenor, clearly suggests as the general rule that whatever is acquired without detriment to the paternal property becomes the separate property of the acquirer. The items of property which are next enumerated are only illustrative and in fact formulations of what had been already recognised as separate acquisition (m). This meaning of the text of Yajnavalkya is justified by history as nowhere did any ancient jurist lay down that such properties could conceivably be left out of self-acquisition. The texts of Katyayana as cited in different commentaries show the law in its final stage in the Dharmasastras. These texts state the law much more fully with all qualifications clearly and explicitly stated and, besides, show a certain amount of advance in details (n).

After the fall of the imperial Guptas there was no paramount power, the country being split up into a number of independent kingdoms. There was confusion and chaos and decline in trade, industry, commerce and general economic condition of the people. From the beginning of the eighth century A.D. and onward India began to feel the impact of Muhammedan

(j) Cambridge History of India (First Indian Reprint), Vol. I, p. 4.

(k) Manu, IX, 206-209.

(l) Yajn., II, 118-119; Sen-gupta on Evolution of Ancient Indian Law, p. 219.

(m) Sen-gupta on Evolution of Ancient Indian Law, pp. 224-225.

(n) Katyayana cited: in Mit., I, iv, 8; in Smritichandrika, VI, 2, p. 77 and VII, 4, p. 78.

invasion of its western regions (o). Amidst this crisis and general decadence in social, political, cultural and economic condition of India started the period of commentators. The joint families still being the foundation of Hindu society, the task of these commentators was to strengthen the joint families and make the individual members economically more dependent on these. Carried away by their enthusiasm for the joint families, these commentators developed a special prejudice against separate property and the operation of the doctrine of self-acquisition (p). As the people had great reverence for the rules of law as set forth in the smṛiti texts they were out to curtail individual proprietary right and change the law by means of ungenerous interpretations. Vijnanesvara's interpretation of the text of Yajñavalkya in his Mitakshara, which is generally dated around the end of the eleventh century A.D., is only explicable in the light of this development in history.

The dharmasastrins like Yajñavalkya and others widened the scope of separate individual acquisition by means of a general rule that any property earned without the aid of paternal wealth shall also belong to the acquirer. Vijnanesvara has construed this general rule of substantive right as a rule of restriction. In interpreting the text of Yajñavalkya he has read the first clause "whatever is acquired without detriment to father's estate" as qualifying all the different items enumerat-

ed thereafter. The result has been as follows: "If a gift is acquired by a member from a grateful person who was placed under obligation by spending family wealth, if property was acquired by gift from a father-in-law who was paid from the family property some wealth for securing the bride for that member (as in an asura marriage) or if the property lost to the family was recovered with the help of paternal estate or if a man learnt at the expense of the family and made gains from that learning, then these kinds of properties were liable to be partitioned among all members" (q). According to Vijnanesvara, whatever is gained without detriment to paternal estate in the cases as explained above alone are exempted; anything outside them is joint property of all the members of the family (r). The author of the Mitakshara imposes further restriction on individual proprietary right by defining self-acquisition as "that which had been acquired by the coparcener himself without any detriment to the goods of his father or mother" (s). This view of Vijnanesvara held the ground and was followed by subsequent commentators. Thus Apararka, who is generally dated in the twelfth century A.D., while commenting on the text of Yajñavalkya says that if the dravya be land, garden, etc., the rule of self-acquisition applies only when the recoverer is permitted by the coparceners to recover the property; if without their consent he recovers, he gets only an extra one-fourth share. Thus he makes Yajña-

(o) Foreword p. XI, pp. 60 and 590, History and culture of Indian people, Vol. III.

(p) Jayaswal on Manu and Yajñavalkya, p. 271.

(q) Mit., i, 4, §. 6; Kane's History of Dharmasastra, Vol. III.

(r) Jayaswal on Manu and Yajñavalkya, p. 270.

(s) Mit., i, 4 §. 2.

valkya's provision for the acquisition of separate property almost nugatory (t). The author of the *Smritichandrika*, which is generally dated around the early part of the thirteenth century A.D., further restricts individual proprietary right by his remark that the estate of the father as mentioned in *Yajnavalkya's* text means the estate of any undivided co-heir (u). Under the Turko-Afghans and the Mughals the moiety wealthy class and the official nobles rolled in wealth, while the general economic condition of the common people did not improve (v). In this state of the society the Hindu law failed to move or make any further concession of proprietary right to the individual. Thus, in the period of commentators the individual's right to separate property under the Hindu law was at its lowest ebb.

In the early days of the British Indian period the sources of national wealth in India were narrowed down. From a great manufacturing country India was transformed into a producer of raw materials because of selfish commercial policy of the East India Company and the British Government. Millions of Indians lost their independent sources of earning in profession or trade and again became economically dependent on the joint families (w). Naturally there was demand for more proprietary rights for the joint family and for new adjustment of its claims with the

claims of the individual acquirer. Side by side, a current of western thought and ideas of individual freedom and economic self-reliance was also gradually becoming palpable and, for socio-political reasons, this development in history was very hard to disregard. The courts reconciled the conflicting claims of these forces by accepting the interpretation of *Vijnanesvara* and making modifications in it on the ground that his extension of the rider to maternal wealth was not covered by the text of *Yajnavalkya* (x). The result was larger scope for joint family property with only a little improvement in proprietary right of the individual. The greatest blow to individual proprietary right was, however, given by the decision of the Privy Council in *Gokal Chand v. Hukum Chand*: The earning of a member of a Hindu joint family was partible, if he was originally equipped for the calling or career in which the gains were made, by means of a special training at the expense of the joint family fund or property (y). This unfortunate restriction on individual proprietary right, being in opposition to the growing individualism, was remedied very soon by statutory enactment. The Hindu Gains of Learning Act, 1930 was passed to make it sure that the gains of learning or earnings from a profession are always the separate property of a coparcener, provided he does not throw them into the common stock.

(t) *Jayaswal on Manu and Yajnavalkya*, p. 271.

(u) *Smritichandrika*, vii, 28.

(v) R. C. Majumdar's *Advanced History of India*, 1956 Ed., pp. 396-397 and 566-577.

(w) Dutt's preface to the *Economic History of India under Early British Rule*.

(x) *Karuppai v. Sankaranarayan* (1904) 27 Mad. 300 F.B.; *Manibhai v. Shankarlal* (1930) 54 Bom. 323.

(y) (1921) 48 I.A. 162.

Thus, by the end of the British Indian period it was well settled that a member of a Hindu joint family could acquire or hold the following separate properties: (1) Property acquired by inheritance from any person other than the father, grandfather and great grandfather (2). (3) Share of property acquired on partition. It would, however, be treated as joint property as between the sharer and his own male issues (a). (3) Income from separate property and purchases made with such income (b). (4) Self-acquired property of the father gifted or bequeathed to the son. The courts, however, expressed conflicting opinions on the question whether the property was to be treated as joint property as between the donee and his own male issues (c). The result was that the law on this point remained uncertain. (5) Gifts and bequests made by other relations and friends and gifts at the time of marriage. (6) Ancestral property lost to the family and recovered from a stranger by a member of the joint family with his own effort without assistance from joint family fund or property (d). (7) Acquisitions made by means of gains of learning. (8) Separate earnings from a profession without the aid of joint family fund or property.

In the post-independence period decline

in economic condition of the common people, growing individualism and gradual disintegration of joint families have become very common everywhere in India. The result has been a little more improvement of individual proprietary right in Hindu law. This has been effected both by judicial decision and by legislation. The Supreme Court in *Arunachala Mudaliar v. Muruganatha Mudaliar* has held that according to the Mitakshara law an affectionate gift by the father to the son does not constitute ipso facto ancestral property in the hands of the donee. The father is quite competent when he makes a gift, to provide expressly either that the donee would take it exclusively for himself or that the gift would be for the benefit of his branch of the family, and if there are express provisions to that effect in the gift-deed or will, the interest which the son would take in such property would depend on the terms of the grant. If there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction and the court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well-known canons of construc-

(2) *Karuppai v. Sankaranarayan* (1904) 27 Mad. 300 F.B.; *Manibhai v. Shankarlal* (1930) 54 Bom. 323; *Muhammad Husain v. Babu Kishva* (1937) 64 I.A. 250; I.L.R. (1937) All. 655.

(a) *Adurmoni v. Chowdhury* (1878) 3 Cal. 1.

(b) *Krishanji v. Moro Mahadev* (1891) 15 Bom. 32.

(c) *Muddun Gopal v. Ram Baksh* (1866) 6 W.R. 71, 73; *Nagalingam Pillai v. Ramachandra* (1901) 24 Mad. 429; *Jugmohundas v. Mangaldas* (1886) 10 Bom. 528.

(d) *Visalatchy v. Annasamy* (1870) 5 Mad. H.C. 150; *Bajaba v. Trimbak Vishvanath* (1910) 34 Bom. 106; *Muttu Vaduganadha v. Doraisinga* (1881) 8 I.A. 99; 3 Mad. 290, 300.

tion (e). And the Hindu Succession Act, 1956 provided that on the death of an undivided member of a Hindu joint family his notional share in the joint family property will go to the other coparceners by survivorship only when there is no female heir in class I or no male heir in Class I claiming through such female heir. When any of them is in existence, such notional share of the deceased in the joint family property will devolve equally on all the primary heirs in Class I or their representatives named in Class I, should any former heirs die before succession, and they will take such interest as their separate property or acquisition (f). However, if the successor is a son of the deceased, he will take his share of inheritance as joint property of himself and his own male issues in accordance with the canons of the Mitakshara. The law of the British Indian period as modified and extended by these recent developments happens to be the existing law relating to separate property of the Hindus.

COSTLY ADMISSION

A Judge impressed on the counsels that the witness was not necessarily untruthful because he altered a statement previously made by him. "For instance", he said, "when I entered the Court today I could have sworn that I had my watch in my pocket. But then I remembered that I had left it in the bathroom at home".

When the Judge returned home that evening his wife said: "Why all this bother for your watch—sending five or six people for it?"

"Good heavens!" said the Judge "I never sent anyone. What did you do?"

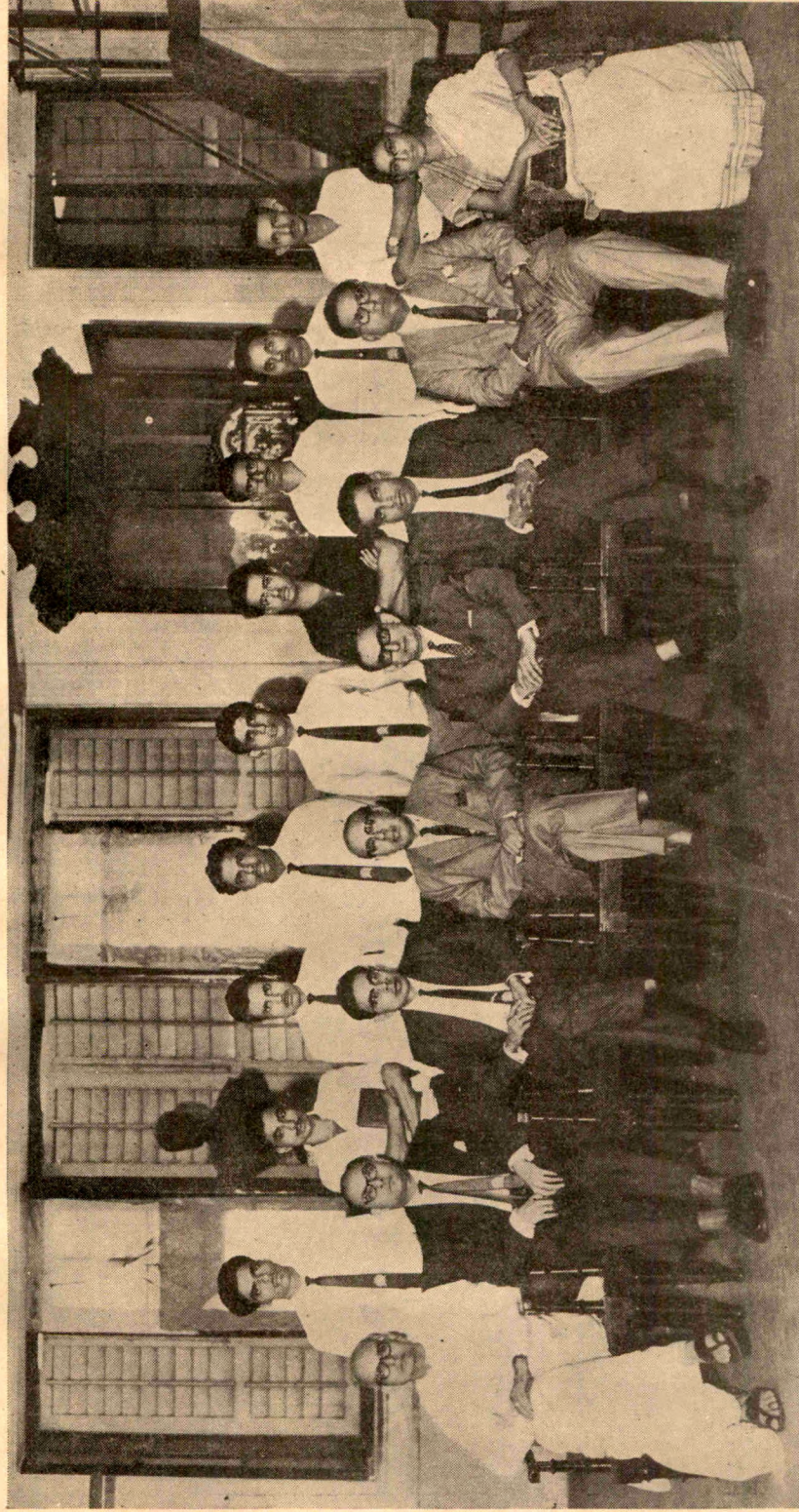
"I gave it to the first one who came. He knew just where it was".

(e) A.I.R. 1953 S.C. 495: (1953) 2 M.L.J. 796.

(f) Sec. 6, Hindu Succession Act, 1956.

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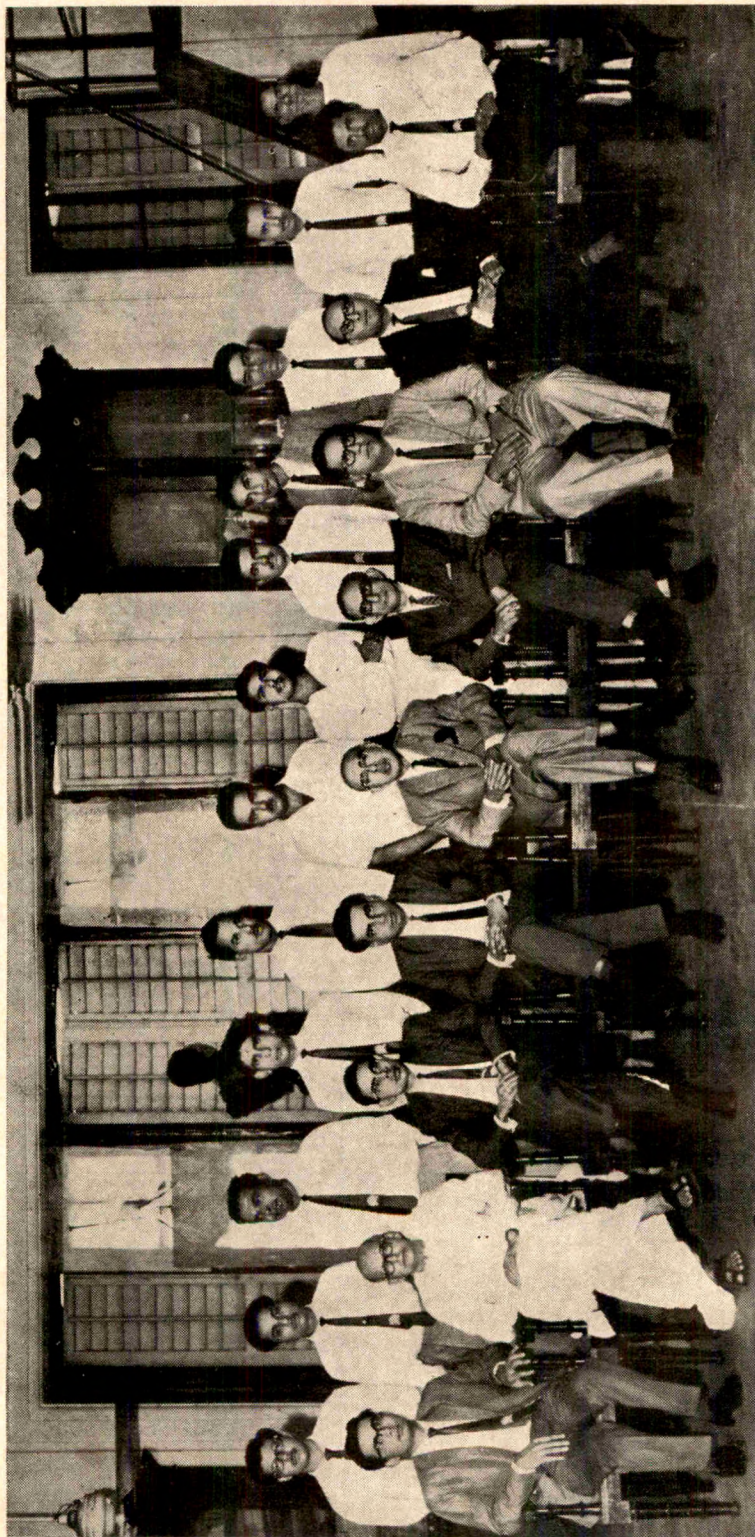


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Food Shortage & Our Policy

GANESH KANT JHA, M.A.
(1st year Law student)

(The writer has suggested in this article certain corrective measures or reform in the context of food-shortage which may invoke far-reaching legal consequences and which is nonetheless a necessary consideration in the modern economic set-up of our society.

—Jt. Editor)

Food being the basic necessity of life, has remained a problem in India, even years after the advent of independence and in spite of the best efforts to solve it, this is getting from bad to worse. The shadow of hunger is looming large all over the country. According to the findings of the Ministry of Food and Agriculture, in India if everyone is given a balanced diet, there will be a shortage of 27% in the case of foodgrains, 50% in the case of pulses, 100% in the case of fruits, 100% in vegetables, 15% in the case of oils and fats and the shortage in case of meat, fish and eggs amounts to several hundred percent. Even milk which is a universally accepted food in India contributes only 10% of the total proteins.

Agriculture suffers from complete vocational degradation. Farmers are the least informed in the science of agriculture and in the modern methods of organisation. That is why agriculture has become a drudgery and has ceased to be attractive as a way of life. There is a complete contrast between industry and agriculture causing the agricultural base weaker.

The result is that the bulk of the population, both rural and urban, which lives

on purchased foodgrains, is caught between the pincers of natural calamities and skyrocketing prices. The all-India index number of wholesale prices of cereals has gradually shot up from 169 in August, 1966 to 194 in February, 1967—an increase of 25 points in six months. In the past four months alone, the wholesale price index of rice has gone up by 16 points, of jowar by 14 points and of wheat by 47 points. The retail prices have increased even more steeply.

In economic terms, this food crisis signifies a large excess of demand over supply. The food habits in almost all underdeveloped countries are known to be rigid. The food demand in India is mostly the demand for cereals, namely, rice, wheat and pulses. On the other hand, the yield per acre for different crops in India, which is the most important factor determining the total production of foodgrains in the country, is far below the corresponding yield rates in countries like the U.S.A., the U.S.S.R. and Japan. Here the yield suffers due to inadequate rainfall at the time of sowing the seeds and lack of moisture in the soil. A slight failure in rains, therefore, causes severe droughts, while excessive rainfall is often followed by floods.

Moreover, our land use pattern indicates that the per capita land available for cultivation has been less than one acre.

Another important factor in relation to food supply is to observe the trend in the import and export of foodgrains. If the net exports get smaller over time and if imports increase over time, the indication is that the home production is progressively falling in relation to demand. In India, we find that food imports have been heavy during the post-war and the post-partition period.

Moreover, one of the main factors causing the food problem is the defective system of distribution. It is no longer a matter of conjecture that the public distribution system has failed in achieving one of its basic objectives, namely, to check the rise in prices, while anti-social elements have continued to thrive on the people's misery. While scarcity conditions kept on developing throughout the past two years and prices soared, the Government with its pathetic dependence on PL-480 supplies looked helplessly and spent most of its time debating whether or not the State should take over the wholesale foodgrains trade and deprive the dishonest trading community of its accepted fundamental right to fleece the people!

No effort was made during the past years to unleash the production potential of the middle, poor and landless peasants who account for 87% of the rural families. While talking of agricultural growth through greater investment and the use of modern inputs and technique, the ruling elite forget the lesson that no major breakthrough in the agriculture is possible without a radical transformation of the feudal agrarian social structure.

Thus, the present food problem has arisen mainly from the growth in demand resulting from increased investment outlay, the relatively inadequate rise in domestic production of foodgrains due to unfavourable weather conditions, the defective system of distribution and the tendency to hoard stocks by the producers as well as the traders in a quasi-free market mechanism.

NATIONAL FOOD POLICY

Therefore, if the prevailing inept and unimaginative management of the food economy persists, India will remain as distant from a national food policy as it is near a repeat performance of scarcity and agony. So the Government should realize the urgency of the agricultural reorganization problem and draw up a new agrarian policy based on the optimum utilization of water and land resources through the application of modern technology. Regional approaches would be out-moded and provide no solution.

Rational utilization of the labour force through diversification of the rural economy; greater investment of capital resources in the agricultural sector; widespread vocational training in agriculture and rural industries and co-operative organization are the four main pillars on which the productive efficiency in agriculture can be raised.

In a country like India where agriculture depends on the vagaries of the monsoon, crop insurance is an absolute necessity. Dairy farming and poultry farming must also be encouraged with a view to relieve pressures on land farming. Farm planning should be realistic, because it makes possible to integrate farmers' expanded needs for technical supplies and production credit.

Notwithstanding, it is essential to take steps to improve the lot of the weaker sections of the rural community by satisfying their hunger for land, tenancy rights and other immediate and pressing demands. The decision of some State Governments to abolish the present system of land revenue and to substitute it with an agricultural income tax has been widely appreciated.

The National Council of Applied Economic Research (N.C.A.E.R.) has in its plan suggested selectivity in intensive cultivation. The Council has commended the idea of "concentrated cultivation" of fewer crops than has been done in the package programme. A total area of 90.7 million acres spread over 185 districts in the country has been recommended for intensive cultivation of eight crops—rice, wheat, jowar, maize, gram, cotton, groundnut and sugarcane.

In connection with the effective national food policy, the following constituents given by K. N. Raj, an economist, are notable:

(i) The dual market principle should be accepted as the basis of the distribution system for foodgrain in all parts of the country. That is to say, while supplies should be made available by the Government at controlled prices, a free market should simultaneously be allowed to exist with all restrictions on the movement of foodgrain removed.

(ii) The requirements of the lowest income groups in vulnerable areas should be fully met by the Government through the controlled sector of the market, but only

a part of the requirements of the middle income groups should be so covered, and the higher income groups should not get any benefit from the Government rationing system as they do now.

(iii) In order to reduce the stock-holding capacity of bigger producers, the present system of providing credit at low rates of interest through co-operative agencies should be discontinued.

(iv) For securing strategic control over available rice supplies, all rice mills in the country should be nationalized.

(v) The policy of securing adequate food supplies should be supplemented through fiscal measures impinging on agricultural incomes such as progressive land taxation.

So, the food production policy must aim not only at meeting the present shortages, but also the needs of the additional population in the coming years. It is time for the Government to evolve some formula to fix prices of various foodgrains keeping in view the interests of the producers and take over the wholesale trade. In the Food Corporation of India it has already an effective instrument to purchase the greater part of the marketable surplus. And if this is done, the whole country can be treated as one zone with the Central and State Governments taking up their responsibility to feed the people with the seriousness it deserves. If all these policies are taken in right earnest, no power-bloc can brow-beat India, which will make rapid strides on the path of progress and prosperity.

The President in our Constitution

S. PARAMESWARAN, M.SC.

(Final year Law student)

Now that the dust and din of Presidential Poll have settled, one can have a cool and calm study and discussion of the role of the President within the ambit of the Constitution in the modern political context in India. The combination of a Parliamentary form of Government modelled on the British system and a Presidential system akin to that of the U.S.A. creates a piquant situation which throws up the question: In whom vests the final authority in the Indian Union, the President or the Parliament? Suggestions have been put forward for straightaway substituting the pure Presidential form a la U.S.A. for the existing Parliamentary pattern, so that the Chief Executive of the country will be enabled to choose Ministers on merit alone, who will be free from the fetters of party politics that are inherent in a Parliamentary system. This implies the failure of the Parliamentary system in India, which is not borne out by facts, for the Parliamentary system has by and large functioned successfully within the framework of the forms and processes similar to those of the Westminster model. As Dr. Michael Brecher, in his recent book "The New States of Asia" puts it, "There are stable States in Asia that are not democratic such as Communist China, others are constitutional but not democratic such as Pakistan, still others are democratic but not stable, such as Ceylon. India is stable, democratic and constitutional, a rare combination among the new Asian States".

Critics of the Indian Constitution,

point out, inter alia, the following weaknesses:

1. It is an indiscriminate conglomeration of the various democratic constitutions of the world.
2. It fails to give due recognition to the basic determinants of constitutional development in history.
3. The constitutions on which it is based have not been studied with reference to the particular considerations that influence the basic pattern in each case.

But, as the internationally famous Jurist Mr. N. C. Chatterjee says, "The success of a constitution does not depend on the excellence of its text alone. In the ultimate analysis, it depends on the people who work it". What has been said about the Constitutions is equally applicable to the form of Government provided for in the Constitution.

Under the Constitution, the President has many roles to play. He is the Supreme representative of the people and has to take the first place in all national functions, festivities and celebrations. He is the Guardian of the Constitution: according to Article 60, he has to take the oath that he will preserve, protect and defend the Constitution and the law and devote himself to the service and well-being of the people. The major constitutional question relating to the President is whether this

oath is to be considered subordinate to Article 74(1) under which the President is to be aided and advised in the exercise of his functions by a Council of Ministers with the Prime Minister at the head. One interpretation is that the oath is a mere formality and the decisions of the Council of Ministers must be deemed to be in consonance with the Constitution, save to the extent that any action is declared illegal by the Supreme Court. The contrary view is that it is unjustifiable to say that the President should be a mere constitutional head during normal functioning of the Constitution and a mute impotent spectator in the case of a national emergency declared under Article 352 for the supersession of a State Government under Article 356. According to the advocates of the activist theory of Presidency, the Presidential type of executive fits in more naturally in a Republic. It is not for nothing that whereas the U.K., the Dominions and Imperial Japan have adopted the Cabinet system, the U.S.A., Switzerland and the South American Republics have gone in for the Presidential type.

The executive power in India is expressly vested in the President and flows from him. According to Article 53 of the Constitution, the President shall exercise the executive power of the Union "either directly or through offices subordinate to him in accordance with the Constitution". Similarly, "the Supreme Command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by Law". (Art. 53). According to Article 74 and 75, the President will be aided and advised in the exercise of his functions by a Council of Ministers which shall be collectively responsible to the House of the People. The protagonists of the activist theory argue, as the first President of India Dr. Rajendra

Prasad did, somewhat tentatively in a highly suggestive address at the Indian Law Institute on the 26th November 1960, that there is no provision of the Constitution which in so many words lays down that the President should be bound to act in tune with the advice of the Ministers. He is a political force representing national unity and invested with powers and functions to restrain the excesses of political parties and government functions.

The Constitution vests in the President extraordinary power to meet different kinds of emergency. Article 352 authorises him to proclaim an emergency on the ground of threat to the security of India or any part thereof by war, external aggression or internal disturbance. Further, the President is empowered to make a proclamation when the constitutional machinery in any State breaks down so that the Government in the State cannot be carried out in conformity with the constitutional provisions, the breakdown caused either by internal or external violence or due to other causes like a political deadlock (Article 356) or the failure of a State to comply with the directions of the Union Government (Article 365). In addition to this, the President enjoys the supraministerial powers of:

1. Dismissing a Prime Minister not enjoying the leadership of his party.
2. Dismissing a ministry which has forfeited the confidence of Parliament.
3. Dissolving the Lok Sabha which appears to the President to have lost the confidence of the people. It can be further pointed out that Article 74(2) of the Constitution specifically lays down the question whether any and if so what advice was tendered by Ministers to the President shall

not be enquired into by any Court. This led Sir B. N. Rau to concede that the Constitution does not impose upon the President any legally enforceable obligation to act in accordance with the advice of his Ministers.

A perusal of the proceedings of the Constituent assembly and the Union Constitution Committee will lend support to the activist theory. The Constitutional Adviser, Sir B. N. Rau had visualised in his first draft a President armed with certain discretionary powers for—

1. Prevention of a grave menace to the peace and tranquillity of the Union or any part thereof.

2. Safeguarding the financial stability and credit of the Union Government.

3. Safeguarding of the legitimate interests of the minorities. In discharging his special responsibilities he would not necessarily act in tune with the advice of the Council of Ministers. Even Mr. Nehru himself stated in the Constituent Assembly that the President under our Constitution was not a 'figurehead' as under the pre-De'Gaulle Constitution of France. He derives his authority from the Nation represented by the electoral college, consisting of the elected members of all the legislatures in the country, which as stated by Dr. Ambedkar, in the Constituent Assembly Debates, was "tantamount to a direct election on adult franchise".

On the other hand, the case for the supremacy of the Cabinet derives its force from the conventions and the intentions and implications of the Constitution as a whole, which aim to establish parliamentary form of Government. The democratic structure of our Constitution could be

irretrievably corroded if the constitutional responsibility of the Council of Ministers to aid and advise the President in the exercise of his functions is not construed as a Charter of real executive power and as the basis of parliamentary authority. Introducing the clause relating to the method of Presidential election, Mr. Nehru observed on 21st July, 1947, in the Constituent Assembly, "we want to emphasize the ministerial character of the Government that power really resides in the Ministry and in the Legislature and not in the President as such". Dr. Ambedkar, Chairman of the Drafting Committee also made it clear that the conventions of the British Constitution relating to the Monarch would be applicable in the case of the President under the Indian Constitution. He went a step further and asserted that if the President failed to act upon the advice of the Cabinet it would be tantamount to a violation of the Constitution and he would be liable to impeachment. Another significant fact is that the Constituent Assembly rejected the amendments tabled by Prof. K. T. Shah on December 10, 1948 seeking to confer real and extensive executive powers on the President.

Some eminent constitutional experts are of the opinion that in the Westminster type of Parliamentary democracy we have adopted, the President's place is the same as that of the British Crown. He has merely "the right to be consulted, the right to encourage and the right to warn". If any other interpretation is put on the scope of the powers of the President, considerable difficulties will necessarily arise, the whims and fancies, likes and dislikes, political prejudices and predilections of the President coming into play. This is dangerous since he is in essence elected not for his political or other views, but in order to discharge the powers assigned to

him under the Constitution irrespective of his views and since unlike the Prime Minister and his Cabinet, the President is not responsible to the Parliament or any other organ under the Constitution.

In sharp contrast to this, irrespective of the evils of the Party system, if any, the Prime Minister occupies his position by virtue of enjoying the support of the majority of those elected on the basis of adult franchise. He is the incumbent of his office by way of operation of democracy. Viewed in this angle that the President should necessarily be bound by the advice of the Prime Minister and his Cabinet is entirely in conformity with the democratic structure and spirit.

As has been mentioned already, the power of the President, according to the advocates of the Parliamentary system, are akin to those of the British Monarch. In support of their case, they quote the words of Dr. Ambedkar who described the President's power thus:—"Under the Draft Constitution, the President occupies the same position as the King under the English Constitution. He is the Head of the State, not of the Executive. He represents the Nation, but does not rule the Nation. He is the symbol of the Nation. His place in the administration is that of a ceremonial device on a seal by which the Nation's decisions are made known". But it must be said that the Crown in Britain is not merely a symbol of the British love for tradition. The Sovereign as the fountain-head of political power is potentially a powerful deterrent to irresponsible ambition on the part of the elected representatives. It is of course true that it is unthinkable for the King of England to disagree with his popular Ministers. Then it is equally unimaginable that the Prime Minister of England should in the image

of the German Chancellor, Hitler seek to overpower the Supreme Authority into subservience and intimidate his people. A political code of honour based on convention and gentleman's understanding forms a stable enough foundation for the constitutional edifice in England.

Whatever might have been the intentions of the Constituent Assembly, the duty of interpretation of the Constitution falls on the Supreme Court under Article 141 of the Constitution. The supporters of Cabinet Supremacy quote the following words from the decision in *Rai Saheb Ram Jawaya Kapoor vs. The State of Punjab* (Reported in A.I.R. 1955 S.C. 549) to reinforce their arguments:—"The President has thus been made a formal or constitutional head of the Executive and the real executive powers are vested in the Ministers of the Cabinet".

In the ultimate analysis, the conflicting interpretations and arguments relating to the constitutional powers of the President have been overstretched. As the veteran parliamentarian Dr. L. M. Singhvi has put it, "the conflicting interpretation of Presidential powers have shown a somewhat unrestrained tendency towards conceptual categorisation and theoretical polarisation. Both the views have been excessively overstated by their respective exponents who have in the process overstrained the language and overstretched the underlying intent and implication of the provisions of the Constitution".

In the changed political context and the attendant social and economic situation, India needs continuity and stability of Government. If, towards this end, the President is vested with extensive authority by way of substituting the Presidential system for the Parliamentary system, it would have needed virtually a rewriting

of the Constitution and corresponding changes in the administrative structure of the States. It would further have meant a break with the past, a new adventure, the benefits of which were by no means certain. Is there any guarantee that the Presidential form will succeed and how will such a Presidential form be brought about after 30 years' convention-building around the Parliamentary system?

We should, therefore, consider whether we could not bring about a harmonious and feasible synthesis between the Parliamentary and Presidential forms by establishing healthy conventions and reaffirming the authority of the President. The 1935 Constitution, though federal in structure, had provided separate, independent and over-riding powers to the Executive. Our Constitution has also retained some of the powers of co-ordination and control.

Even as it is, within the existing framework of the Constitution, the President can play a pivotal role. In the newly elected Parliament, the ruling party does not enjoy the two-third majority necessary for the impeachment of the President. So long as he abides by the Constitution, there is no room for apprehending an impeachment. He need not bow down before the advice of the Cabinet for any law which flies against the letter and spirit of

the Constitution, which he has sworn in the name of God to preserve, protect and defend. Feeling the pulse of the people, he can take bold stand on vital issues and if necessary, proceed to exercise his constitutional powers. In order to facilitate this, he should establish a Council as provided in Article 263, to advise him in the discharge of his special responsibilities on matters in dispute between the Union and the States, or between the States themselves and for better co-ordination of Policy and action. This may be a sort of Privy Council based on the Irish pattern. In addition to including the Prime Minister, the Deputy Prime Minister, the Chief Justice of the Supreme Court, the Presiding Officers of the Lok Sabha and the Rajya Sabha, the Attorney-General and the former occupants of these offices, people of known independence and integrity from outside the administration and political circles could be inducted into the Council. The Council can take an objective and disinterested view and assessment of the issues in dispute and chalk out fair and equitable solutions. A sagacious and popular President like our ex-President, Dr. Radhakrishnan, ably aided and assisted by such a Council may well turn out to be the balancing wheel of our federal polity and safety valve against the decadence of democracy.

LEARNED ADVICE

There was once a Professor of Law who said to his students:

"If you have the facts on your side, hammer them into the jury, and if you have the law on your side, hammer it into the Judge".

"But if we have neither the facts nor the law on our side?" he was asked.

"Then hammer hell into the table," he replied.

Hindu Law of Divorce and Succession

PROF. D. N. GUHA THAKURTA, M.A., LL.B.

Just after independence the legislature aptly thought of amending and codifying Hindu Law and brought about many fundamental changes in respect of the same. It was not that the Hindu Code Bill did not face any opposition. In any event, it being split up into different parts got an easy passage in the Parliament.

Mayne once observed "Hindu law has the oldest pedigree of any known system of jurisprudence and even now it shows no signs of decrepitude. At this day it governs races of men, extending from Cashmere to Cape Comorin, who *agree in nothing else except their submission to it*". It is undoubtedly a massive task the legislature imposed on itself for the welfare of the Society to obliterate all complications and to pass a law uniformly and very widely applicable to the Hindus of the Republic. Some even now feel inclined, as is evident from their observation, to doubt as to whether the law as codified was really wanted by the people of the Republic or it was something thrust upon the people in spite of them. Without sitting on judgement over the same we can consider a law to be acceptable if it is beneficial to the majority of the people. The door is not altogether closed for further modification as required due to the exigencies of changed circumstances.

In quick succession the four Acts, the Hindu Marriage Act, 1955, the Hindu Suc-

cession Act, 1956, the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act of 1956 were passed. The Hindu Marriage Act, 1955 has made provision for dissolution of a marriage by a decree of divorce. The grounds of divorce has been set out under the provisions of Sec. 13 of the Act. The Section speaks of matrimonial offences which may lead to the dissolution of a marriage. It was not provided for the dissolution of a marriage by mutual consent. Many thinkers are devoting themselves to find out more reasonable and cogent grounds besides the matrimonial offences for divorce.

The textual law never allowed divorce. The Hindu Marriage was ever considered to be an indissoluble tie and the only text allowing remarriage of a Hindu woman being

"Nas̥te mr̥te prabrajite klibe ca patite

patyau

Pancaswāpatsu narīnam patiranyo

bidhiyate".

It is in the opinion of some also that the breakdown of a marriage should alone become the basis of divorce. A breakdown principle in a sense is—

"not a reward for marital virtue on the one side and a penalty for marital delinquency on the other.....; but a defeat for both, a failure of

the marital 'two-in-one ship' in which both its members, however, unequal their responsibility, are inevitably involved together"—*putting asunder*.

It is also the experience of many erudite persons that the parties to a marriage are at times eager to dissolve the marriage only to legitimize a "stable illicit union" they or either of them might have concluded.

"This growing desire for divorce and for the regularising of illicit unions points to a growth of rather than to a fall in the respect for marriage as an institution". —Law Commission's Report, 1966, Summarised in *Modern Law Review*, March, 1967.

In some cases it transpired that the parties to the marriage became very much repentant, remorseful and very eager to settle the difference just after filing a petition for divorce and it is also the experience that in some cases the parties to a marriage were very much eager, as aforesaid, to bring to an end the marital tie and to legalise their illicit union by remarriage, but the proviso to Sec. 15 of the Hindu Marriage Act 1955 stood in their way. The proviso speaks of a bar to remarriage, in any event, before the completion of one year from the date of the decree of the court of the first instance. Section 15 runs as follows:—

"When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dis-

missed, it shall be lawful for either party to the marriage to marry again: Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance".

So the parties to a marriage after the dissolution of the marriage become again vanquished and frustrated in their attempt for remarriage due to delay, for the party whom he or she is eager to marry is at times disinclined to wait for the completion of the statutory period of one year. Is it very necessary for the social benefit to retain this provision of the law? Section 12 of the Matrimonial Causes Act imposes a restriction in the sense that the period of waiting for six months is provided after a decree nisi is passed. Section 13 of the Act providing for the remarriage of the divorced persons are materially the same as provided in section 15 of the Hindu Marriage Act 1955 excepting the restriction of one year bar contained in the latter.

If it is in the opinion of many thinkers that at times the eagerness of the parties for remarriage after divorce follows their tendency to legitimize the illicit union already concluded showing growth of the respect for marriage, can we not conceive of the fact that the Hindus had the highest form of regard for marriage which was based on religious concept only and ever an indissoluble tie. It was not also an impossibility that under extreme hardship the marriage could be dissolved. Conversion to another religion, which is also a ground for divorce now, would alone come to the rescue.

As this provision of the law is altogether new to the Hindus, there ought to

be in this country also fair endeavour to go to the root of it and to find out ways and means whereby a law may be passed commensurate with the real requirements and the benefit of the society, which will enable us to avert all complications. Some section of the public might be quite happy over the prior law which never allowed any divorce specifically and some section of the public might be quite happy over the new law. It should cut a via media and it is all right if it is felt to be beneficial to the majority of the people.

The petitioners for a divorce resort to many matrimonial offences as grounds for the same. On critical examination it will transpire that they simply camouflage the real issue which strikes at the very root of the rupture.

With respect to the Hindu Succession Act, 1956, it may be said that though the Act has done away with the basis of inheritance according to the two schools of Hindu law (the Dayabhaga and the Mitakshara) and instead, classification of heirs has been provided by the Act it will not presumably be improper if proposal is made for its further reasonable modification. Section 2 of the Hindu Law of Inheritance (Amendment) Act 1929 provides:

"A son's daughter, daughter's daughter, sister and sister's son shall, in the order so specified, be entitled to rank in the order of Succession next after a father's father and before a father's brother. Provided that a sister's son shall not include a son adopted after the sister's death".

The Hindu Succession Act, 1956, has altered the position of the above heirs in the order of Succession. Daughter's

daughter is ranked before father; 'father' is heir under Class II of the Schedule and son's daughter, daughter's daughter are now heirs under Class I. Even a daughter's daughter being in a different family can now claim the right of residence in the dwelling-house as provided in Section 23 of the Hindu Succession Act 1956. Though absolute ownership is with the female heirs inheriting property since the passing of the Act, the same, has, in a sense, been restricted by Section 23 of the Act, as the female heirs cannot take the initiative to bring a suit for partition of the dwelling-house if it is wholly occupied by the members of the family.

Section 23 of the Act runs as follows:—
"Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow."

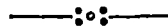
Does the expression 'property includes a dwelling-house' mean that the section will not be applicable in cases where it transpires that there is no other property besides a dwelling-house?

Other problems that arise in this connection are—

- (1) Will this Section be applicable if the dwelling-house is partly tenanted?
- (2) Does it also follow that if it is partly occupied by the members of the family it will not be applicable?

The provision of this Section does not

affect the Hindu Women's Right to Property Act, 1937. On the death of a person his widow and a son inherit the property. The widow will be entitled to a right to partition the property. The right is not curtailed by any provision of the Hindu Succession Act of 1956. In any event Section 23 of the Act ought to have been in more clear terms to avert all litigation. The legislature has, no doubt, codified the law of succession with great ingenuity, still it seems that some provisions of the Act require elucidation.



LAWYERS 'EXPOSED'!

A lawyer starts life giving \$500 worth of law for \$5, and ends giving \$5 worth for \$500.

—BENJAMIN H. BREWSTER

A lawyer must first get on, then get honor, and then get honest.

—ANONYMOUS

Our wrangling lawyers are so litigious and busy here on earth, that I think they will plead their clients' causes hereafter, some of them in hell.

—BURTON

Most good lawyers live well, work hard, and die poor.

—DANIEL WEBSTER

All lawyers, be they knaves or fools,
Know that a seat is worth the earning,
Since Parliament's astounding rules,
Vouch for their honour and their learning.

—JAMES ROGERS

Obscene Publications & the Role of Law

BISHAN KUMAR GUPTA, M.A.
(3rd Year Law Student)

One of the most controversial topics involving in law and morality to-day is the publication of obscene papers, pictures and the like, their impact on society and side by side the role of Law to eradicate those matters considered obscene. It is a fact that the publication and sale of these papers are not new in our country. But with the process of gradual industrialisation of our Society and its more intimate contact with "depraved culture" of the West these obscene publications are growing like mushrooms and are being sold in the market like "hot cakes". In some very recent statements made in some of the prominent Dailies and Weeklies of Calcutta, Bombay and Delhi, the said controversy has been focussed before the public. In fact a group of businessmen, taking advantage of the inadequacy of law in this regard, has set up business to pander the depraved tastes and according to the Journalists of our country almost 85%—90% of buyers of these Obscene literatures are the boys and girls of young age.

There is no doubt that all right-thinking persons will be unanimous regarding the eradication of these obscene publications. But as the word 'Obscene' has never been defined by any provision of law including Indian Penal Code, it is difficult to determine what is obscene. It is also a fact that what is obscene in India may not be obscene in the European countries and

it is a thing the meaning of which changes from age to age, from man to man and from region to region.

According to the New International Dictionary of Webster the term "obscene" means "offensive to chastity or modesty expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be expressed". In the case of Thakur Prasad (1958) A.L.J. 578 (1959) Cr.L.J. 9. their Lordship of the Allahabad High Court have observed the same view. The Bench further added that where a publication is for sale to all and sundry in order to stir sex impulses and leads to sexual and impure thoughts and tends to corrupt the youth, the publication would be obscene. It does not become less smutty or more sanctified because the information has been copied from similar works. The Oxford New English Dictionary defines "Obscene" as "offensive to modesty or decency ; expressing or suggesting unchaste, impure, indecent and lewd ideas."

In England in the year 1868 it was observed in the case of *Queen Vs. Hicklin*. L. R. (1868) 3Q. B. 369, 371, "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence and into whose hands a publication of this sort

may fall". This is the same view which has been given by the Calcutta High Court in the case of *Sreeram Saksena Vs. Emperor*. I.L.R. (1940) 1 Cal. 581, where we have seen that the accused person was released in spite of publication of some nude pictures. Thus we see that "the test of obscenity is not whether the pictures may have an undesirable effect upon a person of depraved or prurient mind but whether they would shock or offend the taste of an ordinary or decent minded person."

In Sec. 292 of the Indian Penal Code it has been provided that, "whoever—(a) Sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or (b) Imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, conveyed, publicly exhibited or in any manner put into circulation, or (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be produced from or through any person, or (e) offers or attempts to do any act which is an offence under this Section, shall be punished with imprisonment of either description for a term which may extend

to three months' rigorous imprisonment or with fine, or with both."

But this section does not extend to any book, pamphlet, writing, drawing or painting, kept or used bonafide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or in any car used for the conveyance of Idols or kept or used for any religious purpose. Sec. 293 of the I.P.C. provides for enhanced punishment where obscene objects are sold, let to hire, distributed or circulated to persons under the age of twenty years. Sec. 294 deals with the punishments for obscene acts in a public place or singing of obscene songs or uttering obscene words in or near any public place. This section provides also that the Magistrate is empowered to order the destruction of all copies of the thing in respect of which the conviction is made. It has been laid down that the accused person shall be punished with imprisonment for a term which may extend to six months R.I. or with fine or with both. These following sections were inserted in Sec. 2 of the Obscene Publications Act (Ch. VIII of 1925) for the purpose of giving effect to the International Convention for the suppression of the circulation of, and traffic in, Obscene Publications signed at Geneva on behalf of the Governor General in Council on Sept. 12, 1923.

We may here mention another Indian Enactment namely, Press Objectionable Matter Act of 1951, which is intended mainly to provide against the Printing and Publication of objectionable matter. Its object is to prevent and not to punish. Here in this respect we may refer also to a leading case *In re Panduranga* (1953) 1. M. L.J. 144. Side by side we should analyse also some English enactments of which the following are worth mentioning.

In 1889 the Indecent Advertisements Act was passed and according to this Act any indecent advertisement was treated with a fine of 40 Shillings or a month's imprisonment. In 1926 the Judicial Proceedings Act made it an offence to print or publish in relation to any Judicial Proceedings any indecent medical, surgical or physiological details calculated to injure Public morals. According to the Metropolitan Police Act of 1939, the publicly offering of Obscene Books or Articles for sale or distribution was treated as punishable. The Post Office Act of 1953 makes it an offence to send indecent books or paintings through the Post. But the Obscene Publication Act, which was enacted on August 29th, 1959 is more powerful in this respect.

Regarding obscene novels and literature similar views could be expressed. In the case of *T. V. Martin Seeker Warburgh Ltd. and others* (1954) 2. All. E.R. 683, it was held that in deciding whether a recently published book or novel admittedly dealing with the sex relationship of man and woman and purporting to describe contemporary literature is obscene, it is necessary to take into account the changed approach to the question of sex. Throwing one's mind over the ages, the real guidance we got about how people thought and behaved is in their contemporary literature. This same thing was granted by their Lordships in the United States in the famous case, *The Ulysses Case Co. Vs.*

Friede (1933) 271. Mass 318. Another interesting question was raised in the case of *Doubldeay & Co. Vs. New York* (1948) 335 U.S. 848, whether these publications are unconstitutional or not. It was observed by his Lordship in the case of *Commonwealth Vs. Gordon* (1949), "Sexual Impurity in literature is that writing whose dominant purpose and effect is erotic. It is the effect that counts more than the desire, if the effect is to incite sexual desire, it is to be forbidden."

In the light of the discussions, we may endeavour to come to some conclusion. Although the term 'obscene' is not clearly explained in the Indian Penal Code and in other legal spheres and although many philanthropic arguments may be put forward in favour of these obscene matters such as to develop the sexual knowledge, still it is, in most of the cases, injurious to our society and derogatory to the interest of our country. In a country like India where frustration, unemployment, illiteracy etc. are wide-spread and serious corruptions are rampant, it is essential to destroy all these obscene literatures, paintings etc. So it should be the immediate duty of our government to set clear legal provisions about Obscene matters, to pass Specific Acts and to punish the offenders so that a sense of decency may prevail over the country and the young generation who are no doubt the back-bone of our society may get strength by diverting their attention in various constructive activities.

References : Leading Cases

(a) Indarman (1881) 3. All. 837.

(b) Thakur Datt (1917) P.R. No. 25 of 1917, 18. Cr. L.J. 126 (1917) A.I.R. (2) 288.

- (c) Sukanta Haldar (1952) Cr. L.J. 575.
- (d) Martin Seeker Warburg Ltd. (1954) 2. All. E.R. 683.
- (e) Gunlam Herssain (1961) P.R. No. 5 of 1917, 18. Cr. L.J. 505 (1917) A.I.R. (L) 219.
- (f) Vishnu Krishna (1912) 15. Bom. L.R. 307, 14 Cr. L.J. 248.
- (g) Kailash Chandra Acharjya (1932) 60. Cal. 201.
- (h) Per Hayward, J, in Rahimatalli (1919) 22. Bom. L.R. 166, 22 Cr. L.J. 513 (1920) A.I.R. (B) 402.



CRIME AND PUNISHMENT

We enact many laws that manufacture criminals, and then a few that punish them.

—TUCKER in 'Instead of a Book'

Society prepares the crime; the criminal commits it.

—BUCKLE

It is not the thief who is hanged, but one who was caught stealing.

—CZECH PROVERB

Whoever profits by the crime is guilty of it.

—FRENCH PROVERB

The punishment of criminals should be of use; when a man is hanged he is good for nothing.

—VOLTAIRE

The object of punishment is prevention from evil; it never can be made impulsive to good.

—HORACE MANN

Law and Management

CHITTA BIKASH BHOWMIK
(2nd year Law student)

"Law and Management" in the present days has posed a great problem, more particularly in the context of the preponderance of Gheraos by the labour. Every sane person is tempted to question—Is the existing legal structure in the country really capable of tackling the matters? Is there any vital defect in the management technique and its principles as practised in India? It will be obvious, if the answers to these questions are sought for by discussing Law and Management side by side.

Before discussing anything on the relation between law and management it will be worthwhile to make it clear what law and management mean. Let us first of all define 'law' which denotes rules of conduct enforced by sovereign political authority. According to Woodrow Wilson, "Law is that portion of established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform rules backed by authority and power of Government." The object of law is to establish order which gives people protection of person and property. Human action cannot be reduced to uniformities of nature but there is a constant endeavour to approach this uniformity by application of law. Human desires are unlimited and human behaviour is peculiar. To satisfy the ever-increasing desires, different people adopt different means. The adoption of means in some cases ex-

ceeds the limit when they create any inconvenience to others. It is with the help of law that a man is prevented from creating inconvenience to others. MacIver, a sociologist, has pointed out that society is essentially co-operative but crossed by conflict. Law has the role to check conflict from undermining co-operation. There is no value judgement involved here. We are just noting the fact as fact. From this standpoint the role of law has a pervasive character and it has changed its clothes with change of season. By season we mean the historic evolution of society through ages. Naturally therefore the subject matter of our study 'Management' has a close relation with law. In other words, management has come to the society as a general need to satisfy the growing demands and necessities upon which law itself retains its dynamic character. Consequently, we can easily state that law and management are essentially and intimately related, because law arises and develops from human needs and the growth of management also depends on the same factor.

After a short discussion of what is law, what purpose it serves and the scope of studying law with management side by side, we are in a better position to describe what the word 'management' actually means. It will not be possible for us to discuss in detail the meaning of manage-

ment by citing definitions forwarded by different eminent authors owing to shortage of space and having due considerations over reader's patience. But all agree that management is an important area of human activity since its function is that of getting things done through people. Modern civilization of ours has become one of co-operative endeavour. Man has found it necessary to co-operate with others in the attainment of objectives. Thus, co-ordination of human effort is the essential problem of all group action, whether the objectives sought are business, military, religious, charitable, educational or social. It is of no use to have advanced scientific knowledge, engineering skills or technical abilities unless the quality of management in organised groups permits effective co-ordination of these human resources. It is the complexities and dynamics of modern society that justify the importance of improved management. In bringing about co-ordination of group activities the manager plans, organises, staffs, directs and controls the activities of others. In most of the large modern enterprises the owners and managers are not the same persons. This separation of ownership and control tend to increasingly emphasise the importance of a manager. For the preservation of interests of the owners in such enterprises, the activities of managers are required to be controlled under the framework of law imposed by sovereign political authority. As for example, we can cite the Indian Companies Act, 1956, wherein specific provisions were made for controlling the functions of Managing Director, Manager, Managing Agents, Secretaries and Treasurers etc. who hold the management position and thereby safeguard the interest of the true owners (shareholders) of the Company.

Some call management an art as it is

practised by different individuals according to their own taste, choice and technique. But the management technique may also be termed as science, a science which has been developed through constant experiments from early days. During early ages with feudal base, although management was in practice we cannot find any marked development owing to the lack of endeavour to put the process and fruit of it in writing. The impact of Industrial Revolution in Great Britain had a very good effect on the science of management. The wave of industrial revolution spread throughout the world so quickly that with the aid of transport and communication facilities, the whole world has become one place. International trade developed. Various complexities arose due to obvious reason. It is only in Capitalist Society where we can note a remarkable acceleration of the development of management practice and its theory. Though management science is not yet in a position to claim its maturity, even then it is developing as the sun rises from horizon to zenith with all its glares from a gloomy start. Management in its many and varied forms covers a multitude of aspects. The persons who co-ordinates the works of others, for the achievement of ultimate objective, are managers. In army the manager is called General, in colleges the Principal, in temple the Mahant and in business houses the executives, the Board of Directors etc. They are all leaders in their respective fields or areas. Each leader is guided by some definite laws. For instance, there is a code of general rules for army. The leader as well as his followers are guided by these rules. The policy formulation of the general is guided by martial law. Similarly in other fields also, the persons or group of persons, who are vested with managerial authority are guided by certain definite rules approved by law.

At present we shall concentrate our attention towards management in the field of trade, industry and commerce. But this does not necessarily mean that others are unimportant. Partiality towards economic activities, we may contain, should not be improperly interpreted. Economics is the study of mankind in relation to wealth and is therefore, a social science. Man has several kinds of activities and economics is concerned with those which relate to the acquiring and disposing of wealth. Commerce deals with human activities which generally deal with purchasing and selling of economic wealth. Hence commerce is closely related to economics. Business operations arise from the existence of demand for economic goods and services. Industry means production of wealth. Trade means that technical process in economics which is concerned with exchange of commodities by the trader from manufacturer to the consumer. In modern world many complexities arise in the way of passing goods from producer to the consumer and these barriers are surmounted by the help of banking, credit, transportation, insurance together with storage facilities of finished goods awaiting disposal. Economists agree that business organisation consists of bringing about a harmonious working of factors of production namely land, labour and capital. To achieve this objective of combining all factors another factor, called entrepreneurial ability, is required. Entrepreneurial ability is the sum total of planning and execution of the plan. This does not necessarily mean that the leader as manager will do all the works himself. He can well create some subordinate management positions which will be devoted to main management work and hence he can spread his leadership by delegation in an enterprise of large size. Thus, as organisation and its management is a part of social, or in other way, a part of economic acti-

vity, it has got necessarily to be influenced by law. Law has a bigger part to play here. The main objective of business houses is to earn more and more profit. Although profit is required for extension, repairs and maintenance of existing business, yet there are legal enactments against excessive profit motive as profit is earned at the cost of consumers and the working class. To this end there are legal enactments against undesirable hoarding of capital and consumer goods; against undesirable combination like trust, curtail, pool etc.; against oppressive exploitation of labourers by underpaying their share of remuneration in the form of wages etc. and against manipulations in stock and produce exchanges. But we must not forget the other side of the picture. Law helps retain the interests of the dominating class as well. We know that the legal aspect is nothing but the expression of the political factors which again is the superstructure on the economic base. We have seen from a study of the evolution of society that the economic base provides a peculiar aspect in class concept—one class dominating and exploiting the other. In feudal mode of production the feudals were the dominating class. Naturally they controlled the political structure whereby in return they controlled the legal superstructure. In other words, the feudals got help from the legal system which conversely preserved their interests. Hobbes' Leviathan proclaimed the absolute supremacy of the kings. Machiavelli pointed out the omnipotence of the feudal lords. The same thing appeared again in the changed circumstances based on the development of means of production and change of relation of the factors of production. As a result of the Industrial Revolution economic power concentrated in the hands of a few. The political Power also, springing out of economic Power, was devoted to the ruling class or the capi-

talists. Consequently the legal system began serving the interests of the capitalists. We see, therefore, that laws not only encouraged concentration of wealth but also helped it grow indirectly. As discussed before, with the development of commerce, trade and industry the legal structure is influenced. Similarly management technique is also influenced by law. This inter-relationship of law and management leads us to discuss which one first influenced the other. One may say that as law has come into society as a need for the preservation of co-operation and also as a safeguard against conflict and as management is a part of social activity, it is followed by legal enactments. Others may contain that owing to the legal enactments the field of management activity is rather curbed or enlarged as the case may be. It is only in socialistic structure of economy we find that all factors of production are state-owned and management function is vested in the state. Legal structure in such socialist state, will obviously reflect the interest of the working class upon which rests the edifice of the state.

It is interesting to note here that in this country the business management is to a large extent influenced by Government control. Owing to this control management work has become more complicated and the management is forced to share the work of policy determination, with the Government, to a large extent. These controls may be of different forms. Two of them affects management vitally. One is concerned with preservation and maintenance of competitive economic structure by forbidding combinations and the second affects the business economic decisions by the everbroadening field of direct control over prices, the right to enter business, the quality and quantity of services rendered, the means used to finance the enterprise,

the character of accounting records kept, the wages paid and other matters of business decisions. In many cases the extent and nature of taxation have tended to outweigh the traditional motivations of profit from sale. With the rise in taxes the highest profit too often results from a course quite different from the production of a maximum of quality goods and services at lowest cost.

One important aspect of law which affects the management decision to a large extent is the enactment of different labour laws. The manager has to manage man, money, machine and material. Among them, the 'man' element is the most unmanageable element, as is felt by managers, and there is a constant clash within two classes—the labourers and managers. The managers want to make more profit by curbing the share of labourers and labourers have to accept the wages fixed by management, even nowadays in many enterprises. The labourers call it as a severe type of exploitation and as the trade union and collective bargaining is accepted by Government concerned in most of the countries of the world, the relation between capital and labour or in other words employer-employee relationship has become more and more bitter in many cases. Strikes and lockouts has become a regular feature. National output has begun to fall and many industries have suffered. As a result of lockout labourers have suffered most. To tackle such an unhealthy situation in the society various labour laws are enacted by the sovereign political authority, such as, Factories Act, Industrial disputes Act, Minimum Wages Act, Payment of Wages Act, Payment of Bonus Act etc. The Power of the managers in direction and control of subordinates has been curtailed due to the impact of Trade Union Act. The most important contribution of

Trade Union Acts in different countries to management has been to focus attention on the importance of human element and the management has been forced to re-examine their job.

We shall now name some of the labour laws with their objectives. Labourers in factories, mines, and construction works etc. are exposed to certain risks. If protective measures are not taken, labourers may be injured by the hazards. Laws are therefore necessary for the preservation of health, safety and welfare of labourers. In India, for example, The Factories Act 1948 provides for the said objectives. Social Insurance is a branch of industrial legislation which is receiving increasing attention in modern times. Employees' State Insurance Act 1948 provides for sickness, maternity, disablements, dependents welfare and medical benefits owing to the low level of earnings of labourers. Industrial dispute Act 1947 provides for the investigation and settlement of Industrial disputes and for certain other purposes. It lays down the procedure according to which disputes between employers and employees can be settled through voluntary negotiation and compulsory adjudication. The Workmen's Compensation Act (Act VIII of 1923) provides for the payment of compensation, by certain classes of employers to their workmen, for injury by accidents while engaged in work.

There are other acts similar to those discussed above. But rather than discussing their contents in detail we shall confine our attention to discussing their impact on industrial management. Inspectors under respective Acts are appointed by appropriate Government to look after the effectiveness of implementation of the rules contained in the Acts by managers. Management decisions are influenced

mainly by the provisions of the Acts, any violation of which will make the managers liable to penalty with fines or with imprisonment or with both. Managers under different laws are bound to submit some returns to the Governmental authority and the submission of returns provides an usual check against negligence of managers.

Dissatisfied workers become a liability to production and this in its turn, makes the capitalists shy and discourage expansion of industrial activity. It is appreciated that discontentment among both the classes moves in a vicious circle. This tendency is most unwholesome from the point of view of economic advancement of a country. Economists as well as legislators have suggested various ways with a view to ensuring a sort of balance between the capital and labour but, these are still far from being satisfactory. Workers' participation in management in industrial units has already been established in the shape of Joint Production Committees, Works Committees, Works Councils, Management Councils and so on. Joint ownership and management is bound to vary in accordance with political set-up, but this has been accepted in principle by all major Western countries like France, Austria, Yugoslavia, West Germany, Belgium, U.K., and other Scandinavian countries. "INDUSTRIAL DEMOCRACY", as it is called, will be realised in India when the workers feel the sense of participation in management and also that they are not only wage-earners but are part and parcel of Industrial Production and that they are important in stature and status in management itself. The Government of India have taken positive interest in the participation of labour in management and ownership both in the Private and Public sectors. But we find that the participation of the

labourers in the management so far has been very negligible and unsatisfactory. As a result we find that workers (labourers) have little option than to resort to other direct measures to fulfill their demands. The trade union facilities are also very limited, both from qualitative and quantitative aspects. Naturally they take new measures, be it justified or not, to press their demand. Consequently an interested person finds the newspapers clamouring about 'Gherao'—the new emergent trade union activity or 'direct' action by labourers. The role of law in this changed situation is yet to be seen.

The word 'management' is the accent on the first syllable 'man', although it is not a derivative. 'Man' is everything in

any management and unless the human material improves, no management can either be adequate or even nearly so, whatever be the law. No legal machinery has yet been evolved which can make, mend or mar a man.

In conclusion, we can say that the society being in a state of flux, the management behaviour has necessarily got to be dynamic and adjusted to environment. The same flexibility should also exist in Industrial Legislation with enough scope for amendments to deal with the labour-management complexities and thereby encourage economic prosperity of the country as a whole. Law may fall behind of this dynamic duty in a particular time and space but it is sure that law will cover up the gap.



ON 'LAW'

Written laws are like spiders' webs, and will like them only entangle and hold the poor and weak, while the rich and powerful will easily break through them.

—ANACHARSIS to SOLON

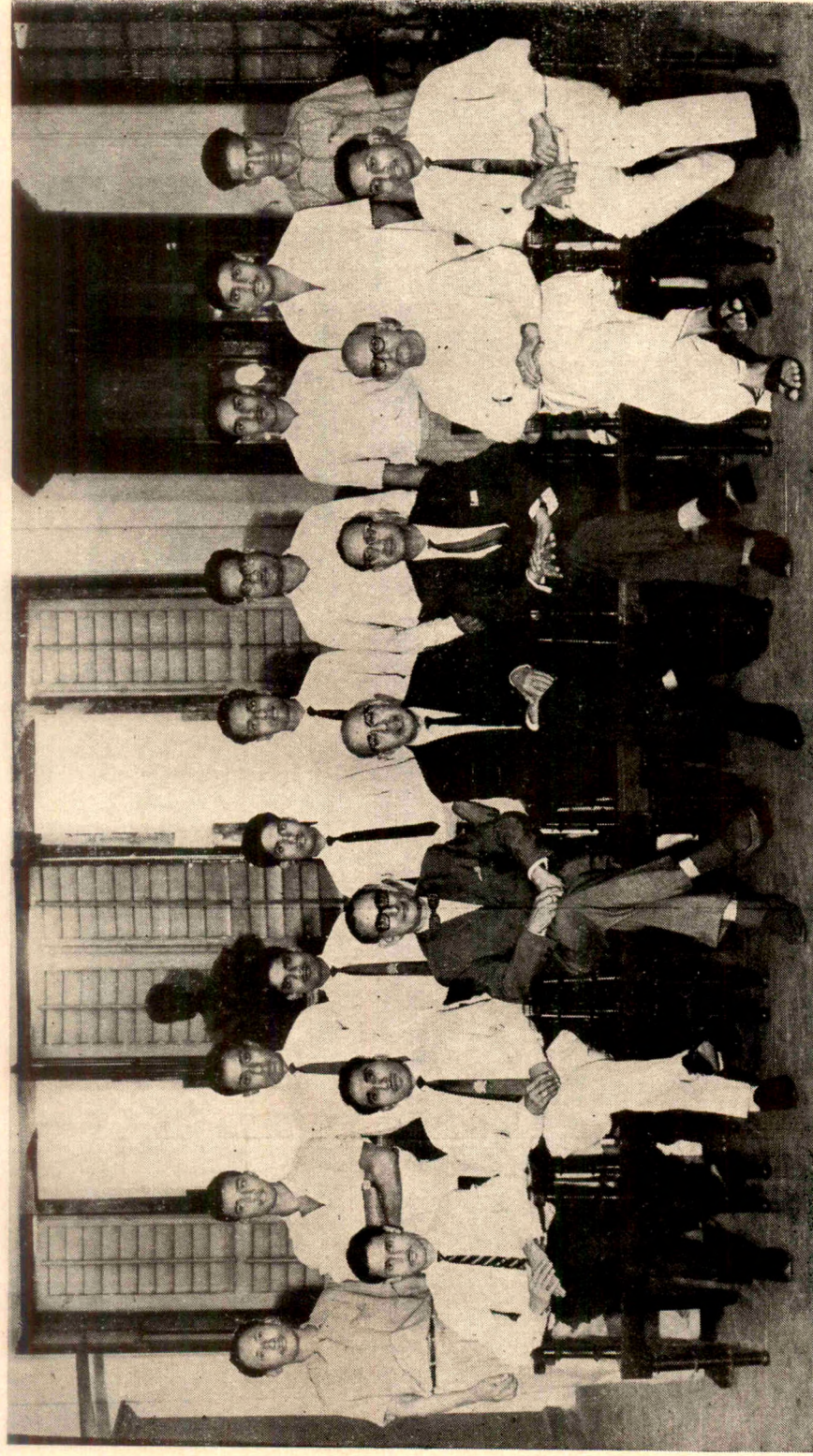
The execution of the laws is more important than the making of them.

—JEFFERSON in 'Letter', 1789

Be you never so high, the law is above you.

—THOMAS FULLER

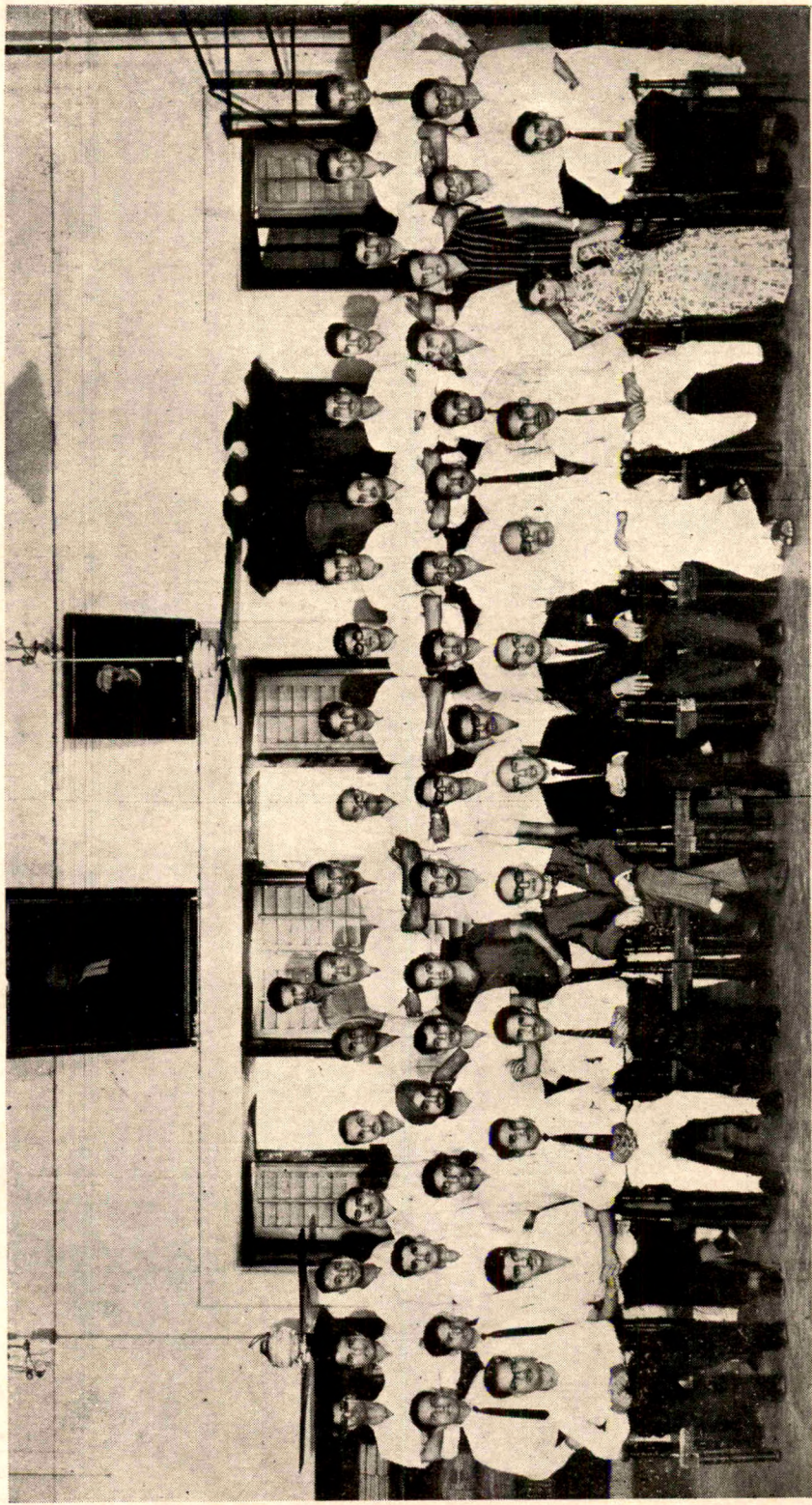
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Right to Property in the Indian Constitution

DIPANKAR BASU

(3rd year Law student)

Right to Property is one of the Fundamental Rights which are enumerated in the Part III of the Indian Constitution. The first thing which strikes us regarding the Fundamental Rights is the formula of compromise as between the individual right and the collective rights. We must, however, remember that there cannot be absolute rights. Rights and duties go together. Individual should have a right, so also the state should have; and of the two, the latter is more important. In a sense these rights are fundamental because they are required for the welfare of the people. These rights cannot be developed on their own. As Prof. Laski says, there cannot be these rights unless there are certain guarantees by law of these rights, and unless there is an atmosphere in the country to enjoy the Fundamental Rights.

We can view the Fundamental Rights from three angles, as Prof. K. V. Rao observes, to what extent they enable a man to take part in political life, to what extent they enable him to express and develop his personality, and lastly to what extent they enable him to lead a group cultural life. The theoretical implication of the Fundamental Rights are (i) that authority is federal and limited, and (ii) that government should not be trusted with power too much. As we lived for a long time under British rule, we have developed a keen love for "English" Rule of Law which restrains the executive. But at the same

time we saw the merits of and adopted in our constitution the ideas contained in American Bill of Rights which restrains the legislature as well. A peculiar arrangement of the different clauses is found in the Part III of the constitution—a general right followed by exceptions, and exceptions to exceptions.

In order to discuss the Right to Property as it was originally framed and as it has become after the different amendments, we must bear in mind certain historical facts. It is generally understood that India is a land of poverty like most of the other Asian countries. In order to eliminate the poverty, the state must control the economy to a great extent so as to nationalise the industry—but it is not a mean task. Another problem is the urgency of land reforms—our country being based predominantly on agricultural economy. Radical land reform has not only economical importance but also political significance. The successful solution of the land distribution would lead to the emergence of a contented landed gentry and would be a solid foundation for a stable political order, when taken into consideration the fact that eighty percent of India's population is wedded to agriculture. The Congress Election Manifesto of 1945 called for state ownership or control of a wide variety of industries and services and for the removal of intermediaries between the peasant and the state. The Mani-

festó also said that the rights of intermediaries should be acquired by payment of equitable compensation. The Union Cabinet, early in 1948, in a broad resolution on industrial policy, noted the inherent right of the state to acquire industrial undertaking and laid down that if property was acquired by the government, "the fundamental rights guaranteed by the constitution will be observed and compensation will be awarded on a fair and equitable basis".

Prof. M. V. Pylee observes that neither in the Congress party in Assembly nor in the Indian cabinet was there any unanimity on the solution of the problems. Opinions were sharply divided into at least three major groups, an extreme left which favoured nationalisation even without compensation, an extreme right which favoured nationalisation with full compensation at the market value of property acquired and a middle group which presented a more and yet progressive attitude, which is a compromise between the two extremes. These conflicting attitudes to this complex problem were reflected in the debates of the Constituent Assembly. By the end of 1949, a generally acceptable formula was found. The Assembly adopted it by a vote of 56-34. The formula bearing the names of Mr. Nehru, Pant, Munshi, Ayyar and N. G. Ayyangar was moved in the Constituent Assembly as an amendment to the Draft Constitution. The provisions of these amendment would appear from the articles of Indian Constitution which are as follows:—

As it has been originally framed, Art. 31(1) says that no person shall be deprived of his property save by authority of law, Art. 31(2) says that no property shall be acquired except for a public purpose and except by authority of a law which pro-

vides for compensation for the property so acquired and either fixes the amount of the compensation or specifies the principle on which and the manner in which the compensation is to be determined; again according to Art. 31(3) the assent of the President is essential if a state legislature makes a law under clause (2); clause (5) of Art. 31 gives a list of exemptions when no compensation need be paid and clauses (4) and (6) are intended to validate certain Bills and certain Acts already in the statute book regarding land reforms.

Right to Property is protected in the unwritten constitution of the U.K. by the 'Common Law' of the country. In England in the case of *Entick vs. Carrington*, Lord Camden observed—"By laws of England, every invasion of private property, be it even so minute, is a trespass. No man can set his foot upon my ground without my licence. If he admits the fact, he is bound to show by way of justification that some positive law has empowered or excused him". The Fifth Amendment (1791) and the Fourteenth Amendment (1868) of the American Constitution also provide that nobody shall be deprived of life, liberty or property without 'due process of law', and that private property cannot be taken away for public use without just compensation. The Indian Constitution, however, avoided the American concept of 'due process of law' by accepting the phrase 'by authority of law'. Government of India Act, 1935, clause (1) of section 299 was also similar to that of clause (1) of Art. 31 of the Constitution.

The Constitution of India also refers to the Right to Property in Art. 19(1)(f). Prof. K. V. Rao is of the opinion that Art. 19 speaks of a freedom—of a kind of liberty—which a free citizen of India can enjoy; while Art. 31 deals with the right

of the state to deprive him of it and the manner of doing so. According to the 'Makers' of our Constitution, the real article that conferred the right of private property was Art. 24 of the Draft, i.e. the present Art. 31. But in the case of present Art. 21 (Protection of life and personal liberty) the 'Makers' took it for granted that the right was inherent in man.

Art. 19(1)(B), confers on all citizens right "to acquire, hold and dispose of property" and Art. 19(5) empowers the state to impose reasonable restrictions "in the interests of the general public or for the protection of the interests of any Scheduled Tribe".

Das J. observed (*State of W. Bengal v. Subodh Gopal and others*, 1953), "Right to hold property is conferred only on citizens (Art. 19); aliens may be allowed to own and hold property but may also be prohibited completely, whereas in the case of citizens, it can only be regulated under Art. 19(5). But in both cases, the state can deprive them of their property by virtue of Art. 31."

One difficulty that faces the court is the definition of 'property' itself. According to Sastri C. J., Art. 19 deals with general right and Art. 31 deals with specific and concrete proprietary rights (*State of W. Bengal v. Subodh Gopal and others*, 1953); majority view in the Supreme Court in this case was that, "property means not only specific things susceptible of private appropriation, but also in its legal sense of a bundle of rights"—this view was reiterated in the case of *Commissioner v. L. T. Swamiar* also. But the court also said that such a right could be recognised by law as capable of distinctive acquisition and possession and thus in the case of *Chiranjitlal v. Union* (1950) the Supreme

Court held that while a 'share' in a company was property, the other rights of a shareholder like his right to pass resolutions, or remove directors etc. could not be called property because they were incapable of being acquired etc. apart from the ownership of the share. But again, in *Swamiar* case, the court ruled that Mohant of a temple had a proprietary right in his office.

D. Basu, J. says that property means both movable and immovable, tangible and intangible property. Property means different things to different people. Firstly, property right over particular object is a matter of recognition by law and what is not recognised by law ceases to be private property. The courts of India have agreed to this view. Secondly, property means an abstract bundle of rights as well as some concrete possessions. Thirdly, property can be regulated or acquired either temporarily or permanently. According to the 'Police Power,' which is in America, the state has power to regulate the use of property; management is taken over by the state and not the ownership. The doctrine of 'Eminent Domain', according to Nicholas, means, "power of the sovereign to take property for public use without the owner's consent." Das J. in the case of *Chiranjit Lal v. Union of India* (1950) laid down that clause (1) of Art. 31 dealt with the exercise of the 'Police Power' of the state, whereas clause (2) of Art. 31 dealt with 'Eminent Domain' and that compensation was payable only when property was acquired or taken possession of by the state for *public purpose*, which according to Basu J. means general interest of the community as distinguished from private interest of an individual. Again public purpose has been interpreted to mean a purpose, i.e., an object or aim, in which the general interest of the community as op-

posed to the particular interest of individuals, is directly and vitally concerned (*Framjee v. Secretary of State*, 1914).

Prof. Willis puts it thus—"According to the newer viewpoint there is a 'public use' if the thing taken is useful to the public. This makes public use for eminent domain practically synonymous with public purpose or taxation and somewhat like social interest for police power. Under this rule it is not necessary for the benefit to be for the whole community, but it must be for a considerable member." To Basu, J. the above observation is more appropriate to Indian Constitution in as much as the expression 'public purpose' is wider than 'public use'. Thus, as Supreme Court has observed, there may be circumstances where acquisition of property for the benefit of even an individual (*State of Bombay v. Khushaldas*, 1950), or a section of the community (*Secretary of State v. Gopala*, 1930) may benefit the public at large.

It was made clear in the Constituent Assembly that the authority, as regards compensation, would be vested in the legislature and not in any court including the Supreme Court. As Mr. Nehru expressed, "Within limits no Judge and no Court can make itself a Third Chamber".

In spite of this the Court came into the matter. Soon after the inauguration of the constitution, the Zamindars tested the validity of the provisions of Art. 31, against some of the fundamental rights. We can notice this first in the case between *State of Bihar and Maharaja of Darbhanga* (1950). The Patna High Court justified the point of Maharaja and declared Land Reforms Act (1950) as invalid. The decision of the High Court was unanimous. It was based on the equality provision of the constitution and not under the pro-

perty right clause. The Allahabad High Court, however, found the Uttar Pradesh Zamindari Abolition and Land Reforms Act (1950), valid in all respects (case of *Suryapal Singh v. Government of U.P.*—1951). The decision of the Nagpur High Court also went in favour of the state law. But the so called Zaminders were not disheartened and carried the battle to the Supreme Court in Appeal. When it was found that the legal battle was going to consume an unduly long time with consequent frustration for the general mass of people and the loss of confidence in government it was decided to find out new ways and measures to combat the situation.

Accordingly, it was decided to amend the constitution whereby judicial road blocks could be removed and immediate implementation of land reforms legislation could be made possible. The First Amendment of the constitution was so passed in 1951, adding two new Articles, Art. 31A and Art. 31B, with a view to fully safeguard the various land reform laws against possible attack arising from any fundamental right in the constitution. Further a new schedule containing all such state laws—the Ninth Schedule—was added to the Constitution to make the scope of the First Amendment clear. The effect of the amendment is that no law providing for the acquisition of any estate by the state shall be considered to be void on the ground that it takes away any of the rights guaranteed by the constitution. The appeal to the Supreme Court was still pending when the 1st Amendment was being passed.

Anticipating the strong position of the state under the new amendment the Zaminders carried their battle to the court against the constitutional amendment on the plea that Parliament as it was constitut-

ed then of one House, was not competent to pass the amendment. But the court rejected this plea and gave a unanimous verdict in favour of competence of the Provisional Parliament to amend the Constitution (case of *Singdeo v. Union of India*, 1952). It should be noted that while the Court has the ultimate power of determining what a public purpose is, generally it would uphold the will of the legislature as expressed in the statute. But the position is different in the case of compensation.

In the case of *Chappell v. United States Government* (1895), it was laid down that all kinds of private property and every character of right, title or interest therein which a citizen may possess is subject to the power of eminent domain. No question of compensation arose when property was taken or destroyed in the exercise of police power. This was believed by the framers of our Constitution. But the Supreme Court did not accept this. In the case of *Mrs. Bela Banerjee v. State of West Bengal* (1951), High Court rejected one part of the case and admitted another part of the case. Mrs. Banerjee pleaded that her property had not been acquisitioned on ground of public use, as the slums which she owned had been transferred to the West Bengal Settlement Kanungo Society Ltd. But the Court's view was that even this transfer of ownership serves the public purpose. In this case it was also laid down by the court that compensation must be equal to market price and a solatium of 15 per cent more is to be given to compensate the compulsory nature of the acquisition which was already in practice in India under the Land Acquisition Act of 1894.

The Supreme Court's verdict was also different in the *Sholapur Mill* case. Due to mismanagement the production stop-

ped in the Mill and many persons became unemployed. The employees asked the state to take over the management. The State did so by making an ordinance. But the Supreme Court was against such take-over as the Board of Directors' individual right would be at stake if compensation to them was not paid. The Supreme Court's decision in the case of *Sagir v. Govt. of U.P.* (1954) regarding the 'Road Transport' matters also went against the government's action.

These judicial pronouncements had far reaching consequences; they showed that legislation on social and economic welfare which necessitated the acquisition of various forms of private property was virtually impossible because of the prohibitive cost involved in the payment of compensation. Zamindari abolition was only the first stage in a planned programme of legislation of social and economic welfare. The government came into conclusion that in the 20th century political field in case of a conflict between 'Individual interest' and 'Collective interests', the latter ought to prevail over the other. All these led the Parliament to make Fourth Amendment of 1955.

The chief provisions of the Fourth Amendment are that compensation under Art. 31 is no more a justiciable matter under the Court; the question of compensation is withdrawn from the field of judicial determination and placed exclusively at the will of the legislature (case of *Lilabati vs. State of Bombay*). The word 'requisition' was substituted in clause (2) for the expression 'taken possession of' in order to override the extended meaning given to the latter expression in the cases of *State of West Bengal v. Subodh Gopal* (1954) and, *Dwarkadas v. Sholapur Spinning* (1954). In *Chiranjit Lal* case, Mukherjee J. observed that acquisition means acquiring the entire title of the

expropriated owner, whatever the nature or extent of the title may be. All rights of the original holder pass to acquirer leaving nothing to the former. This view is effectively made clear by the Amendment Act by introducing words, 'transfer of ownership' in Art. 31 (Clause 2A). As the connotation of the term "Estate" was different in different part of the country, the expression 'estate' has been broadly defined so as to cover all possible kinds of rights in estates—quantitative and qualitative, in an area co-extensive with an estate or only a position thereof. (Case of *Atma Ram v. State of Punjab*—1959). Explanation of the word 'estate' includes not only Zamin-daries, but also the lands of intermediate interests—Raiyats, Tenure-holder, Under Raiyats, and other intermediaries. Allaha-bad High Court in the case of *Ajaib Singh v. State of U.P.* (1957), lays down that they would not come ipso facto within the definition clause of Art. 31 (2-b), unless one is an intermediary. But Calcutta High Court in the case of *Surendra v. State of West Bengal* (1958), and, Punjab High Court in the case of *State of Punjab v. Keshar Singh*, decided that sub-clause includes any right in an estate, whether it is the right of a rent-receiver or of a person in actual possession of the land—this was supported by the Fourth Amendment.

It can be mentioned here also that compensation need not be paid, if the law provides for a tax or a penalty, or if the law affecting property has been made for promotion of public health or prevention of danger to life or property, or, if the law was made pursuant to an evacuee property agreement. The object of the 4th Amendment was also to authorise legislature, to control the ownership of land, to take over management of properties for a limited period, to amalgamate Corporations in public interest, to affect and change the

rights of company executives and directors, and lastly to modify or abolish the rights in respects of mines and mineral oil by termination of the existing agreements. All these laws are kept above challenge on the ground of violation of Articles 19, 14, or 31, provided they receive the approval of the President.

It was argued in the Parliament by some members in connexion with the Fourth Amendment Bill that the proposed new clause (2) of Art. 31 would materially help to promote the economic well-being of India. But Prof. D. N. Banerjee observes, "We are afraid that it may act otherwise. Regard being had to what economics consider to be the 'fundamental principles of human nature', we feel that in the long run the new clause (2) may, as a great damper, adversely affect the incentive to hard work on the part of our people and in particular the inducement to invest money in productive enterprises on the part of our entrepreneurs. Moreover, it may even scare away foreign investment from our country".

However, during the consideration of the Constitution (4th Amendment) Bill, the Minister for Home Affairs, Sri G. B. Pant observed in Rajya Sabha on 19th April, 1955,—“I think the Parliament will always try to take a reasonable view. The collective wisdom of the Parliament will do the right thing and will always take a just and equitable view. The Parliament consists of representatives of the people. It is interested in advancing the welfare of all classes and all communities. We have to work for the establishment of a welfare state on a socialistic pattern. That is what the Parliament has decided. There are certain Directive Principles in Part IV of our Constitution. So in whatever the Parliament does, it will place before itself

the central objective for which it has to function. And it will be consistently with these objectives and principles which make every effort to render justice to everyone—to pay to Peter as well as Paul what is due to either. So there need be no apprehension in any quarter”.

Some critics point out that under the 4th Amendment, the State can do anything and everything as regards to the Right to Property. But Basu D. J. says that it is not true that all property-owners since 1955 are under a constant threat of confiscation, if we consider certain facts—First, the amendment does nothing more than a return from the American doctrine of ‘Judicial Review’ to English doctrine of ‘Parliamentary Sovereignty’. Secondly, so long as the statute remains on the statute book there is no fear of confiscation or nominal compensation in the field to which it applies. Thirdly, as regards new legislation, it was suggested, by Mr. Nehru, during the debates of the Amendment Bill that it was not the intention of the government to enact confiscatory legislation, but the object was to withdraw the question of quantum of compensation from legal controversy.

Later on, Parliament amended the Constitution again, which is known as the Seventh Amendment. The Seventh Amendment Act changed the Seventh Schedule by removing provision about compensation. Whereas ‘entry 33 of List I’ and ‘entry 36 of List II’ have been completely omitted by the 7th Amendment, ‘entry 42 of List III’ abolishes the condition of compensation and simply authorises the legislatures to make laws on acquisition and requisitions of properties.

Finally, we come to the Seventeenth Amendment which altered the Art. 31(A).

This amendment gives a clear explanation of the word ‘estate’ and also provides that in case of acquisition by the states of the interest of an agriculturist in a land used for his personal purpose, the State has to pay compensation which is equal to the market value of the property acquired.

According to some critics, if the Right to Property is not justiciable, then it is no longer a Fundamental Right; and others are of the opinion that the sanctity of the property is lost, if unjust compensation is legalised and totalitarian trends are encouraged under the cover of the doctrine of ‘Parliamentary Supremacy’. But this is not true when we consider the fact that the 4th Amendment closed the gap between Fundamental Rights and Directive Principles. Mr. Nehru was of the opinion that the Fundamental Rights must subserve the Directive Principles. By Fundamental Rights we mean individual privilege and the Directive Principles mean social ethics for a just society. A person has got a right, but he is not to exercise it in such a way as to violate the norms of social ethics. Prof. Gledhill observes, “The majority of the Indian Fundamental Rights are what are called, ‘liberties’ in England, meaning thereby that there are few restrictions placed by law upon them, for there is no declaration of the rights of the subject, nor guarantee of their enforcement; in fact they are only ascertainable from the remedies available in the case of their infringement.”

An important legal question has arisen due to the Supreme Court’s recent decision in the case of *Golaknath and others vs. State of Punjab*. The Supreme Court in giving out its verdict on the 27th February, 1967, said that the Parliament of India would have no power to take away or abridge any of the fundamental rights guaranteed by the constitution by way of

(constitutional) amendments. These rights are given a transcendental position and kept beyond the reach of parliamentary legislation, according to the majority judgment of the Supreme Court. The Constitution (First, Fourth and Seventeenth) Amendment Acts, protecting legislation relating to the acquisition of property by the state from judicial review on the ground of violation of fundamental rights, was beyond parliamentary competence. Great social and economic changes, however, had been made on the basis of these laws and having regard to the requirements of justice the court would limit the effect of its judgment to future legislation only. The existing amendments to the constitution were therefore declared valid.

The Statesman editorial, dated the 1st of March, 1967, points out, "there will certainly be wide support for the view that the fundamental rights should not be treated as a matter of convenience by the Government of the day and frequently amended in the form in which it has been, in the 1st, 4th, and 17th Amendments, by validating a whole series of laws of dubious quality enacted by the states irrespective of their intrinsic merits. The fundamental rights should be regarded as sacred and immutable, as the court points out, but only in the sense that most social laws can be so regarded in the context of changing social conditions and needs. The constitution itself suspends Art. 19 in an emergency and enables the President to suspend the enforcement of the rights conferred by Part III, indicating limit to this principle of immutability. The minority judgment holds that laws, the enactment of which is forbidden under Art. 13(2) in contravention of the fundamental rights, refer only to ordinary legislation, not to constitutional amendments following the special procedure in Art. 368."

The Statesman editorial also adds that the acceptance of the majority view would introduce a rigidity in the constitution which many might consider unwise as it removes a safety valve and reduces the limited flexibility provided through constitutional amendments. It may also be pointed out that in future perhaps, no Government at the centre is likely to abuse this power because it may be unable to muster the majority which the Congress Party hitherto enjoyed: but the taking away of the power of Parliament (through a special majority) to amend Part III might imply a diminution of the sovereign powers conferred on it under the constitution. Since Art. 368 also specifically provides for its own amendment, under a special procedure requiring a ratification by half the number of states, Parliament can perhaps amend it to clarify what "amendments" envisaged in the article would include, whether they are or not, inclusive of Part III.

Mr. N. C. Chatterjee, in an article published in the Amrita Bazar Patrika, dated the 31st of March, 1967 also points out, "On a careful study of the judgments delivered in this case, in particular those delivered by Chief Justice K. Subba Rao and Justice Hidayatullah we are fully convinced that some of the views expressed therein have far reaching implications, and if allowed to prevail, they may not be in the best interests of the people at large." He also points out that in order that the fundamental rights may continue to remain the basic feature of our constitution, they should be adaptable to changing conditions; and they should be amendable. It is the duty of all enlightened citizens, in particular of the legal community, to apply their minds to this vital question and suggest a satisfactory answer to it.

We can say that the recent decision of

the Supreme Court must be studied thoroughly in the context of the Right to Property also. We have to watch what actually the Government and the Parliament do in future. In this era of the "welfare state", the common interests of the people must not be totally neglected in order to protect the individual interest. In the 19th century, the state needed to maintain law and order only; but in the 20th century the state needs to look after the social interests of the people as well. In this context the state's functions have greatly been increased in the modern age. There must be coherent and integrated governmental functions in order to implement the welfare policies. So unnecessary

legal obstacles must not be allowed to stand on the way of the common interests of the people. There must be a vigilant electorate to safeguard the rights and interests of the people at a common level.

Prof. Granville Austin observes, "The fundamental right of other constitutions may have served as well as—or even better than—those of Indian Constitution, in protecting the existing rights and liberties of the peoples concerned. But it is very doubtful, however, if in any other constitution the expression of positive or negative rights has provided so much impetus towards changing and rebuilding society for the common good."

References :

- D. Basu—Commentary on the Constitution of India, Vol. I & II 4th Ed.
- D. Basu—Shorter Constitution of India.
- M. P. Pylee—Constitutional Government in India.
- Granville Austin—The Indian Constitution: Cornerstone of a Nation.
- D. N. Banerjee—Some Aspects of the Indian Constitution.
- Alan Gledhill—Fundamental Rights in India.
- K. V. Rao—Parliamentary Democracy of India.
- D. N. Banerjee—Our Fundamental Rights, Their Nature and Extent.
- Norman D. Palmer—The Indian Political System.

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ON 'CONSTITUTION'

We are under a Constitution, but the Constitution is what the judge say it is.

—Speech by CHARLES EVANS HUGHES

A good Constitution is infinitely better than the best despot.

—MACAULAY

In questions of power let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

—JEFFERSON in 'Kentucky Resolutions'

Constitution should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things.

—ALEXANDER HAMILTON

A Study on the Bail System in Common Law and Civil Law Countries

THE HON'BLE MR. JUSTICE S. N. BAGCHI

of the Calcutta High Court

For the study of the bail system in the common law and civil law countries of the world, the law relating to bail, as now obtaining in England, America and India, being the common law countries, and in Sweden, Denmark and Italy, being the civil law countries, having in the former, accusatorial, and in the latter, inquisitorial procedure of trial of offences, need be analysed on its broad features. England has been maintaining the bail system which is as old as English law. Bails are sureties taken by a person duly authorised, for appearance of an accused person at a certain date and place to answer and be justified by law. So, bail means release of a person accused of a crime from custody upon giving security for his appearance in court at the required time⁽¹⁾. Hale speaks of bail and mainprise (main prife). Mainprise (main prife) is a recognizance in sum certain given by the person accused of crime in order that the sum of the recognizance may be forfeited to the crown if he defaults in appearing before a court to answer the charge. In mainprise (main prife), the accused is delivered per manucapcionem only and is, therefore, out of custody, but he that is bailed is, in supposition of law, still in custody; and the parties that take him to bail are in law his keepers and may reseize him to bring

him in. A person released on personal bond is not in custodia legis, but a person released on bail, upon sureties furnished, is still in custodia legis⁽²⁾. In practice, the law of England recognises a personal recognizance of the suspected criminal in which he himself pledges to pay to the crown a sum of money if he does not appear when required, or in some instances the personal recognizance of the suspect and the co-surety may satisfy the bail requirements. In India, the provisions similar to the English law relating to the bail system would appear in sections 496 and 499⁽¹⁾ of the Code of Criminal Procedure. Section 496 of the Code of Criminal Procedure enjoins that the Arresting Officer or the Court, if he thinks fit, may, instead of taking bail from the suspected criminal discharge him on his executing a bond without sureties for his appearance. Section 499⁽¹⁾ of the Code contemplates release on bail or release on his own bond for a sum of money as would be determined by the arresting officer or the Court, of the person accused of a crime. Section 500 of the Code provides that as soon as the bond, either bail bond or personal bond, has been executed, the person for whose appearance it has been executed shall be released. The bail bond or the personal bond, both in England and in India, binds the person

(1) Hale's *Historia Placitorum Coronae*, Vol. 2, Edition of 1800, Chapter XV, p. 123

(2) *ibid*(1).

released to appear when called upon by any court to answer the charge. Neither in England nor in India security in the form of cash, bonds, real estate, equities or surety-company bonds are required to be posted in furnishing of bail. In the United States, bail requirements must usually be satisfied by full security or surety-company bonds(3). In Sweden, neither in law nor in practice, is there any provision whatsoever for bail. The accused after enquiry by the prosecutor or the court, or both, is either released, pending trial, or held in detention. Italy and Denmark while stressing the stark pre-trial alternative of liberty or custody also make provision for bail as an alternative measure but still in those countries, in practice, bail system is not usually applied. Sweden, Denmark and Italy abhor bail system on the ground that it is an instrument oppressive to the poor but convenient to the rich and well-connected. In the American system of justice defendants of limited means are often detained simply because bail-bondsmen do not consider them good financial risk(4).

When the Administration of Justice in England was in its infancy, arrest meant imprisonment of the accused per-

son without preliminary enquiry till the Sheriff held his "tourn" at least, and in more serious cases, till the arrival of the justices, which might be delayed for years and it was, therefore, a matter of utmost importance to be able to obtain provisional release from custody(5). Stephen observes that this right to bail was recognised by Glanville.

Since the time of Edward I, Sheriff as the local representative of the Crown and head of all Executive part of the administration of criminal justice had the right to arrest and imprison a suspected criminal and admit him to bail according to his discretion. His discretionary power was abused in many cases wherefor the Statute of Westminster The First had to be passed to correct the abuse of Sheriff's discretionary power (3 Edward I, c. 12, Ad 1275). (6) Stephen says that this Statute was for 550 years the main foundation of the law of bail in England. Under the statute of Westminster The First certain classes of offenders would not be bailed, and on the other hand, certain classes of offenders who had committed less serious offences were to be bailed. We find in sections 496 and 497 of the Code of Criminal Procedure(7) offences for which bail must be

(3) Journal of the International Commission of Jurists, Winter-1964, Vol. V., No. 2, p. 204.

(4) *ibid*(3) page 207.

(5) Stephen's History of the Criminal Law of England, Vol. I, p. 233.

(6) *Ibid* (5)—p. 234.

(7) Sec. 496 Cr.P.C.

When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on bail ;

Provided that such officer or court, if he or it thinks fit, may instead of

granted and offences for which bail may be granted in certain circumstances, i.e. bailable and non-bailable offences.

Between 1275 and 1414 Sheriff's power had been to a great extent transferred to the Justices of the Peace in whom the power of admitting prisoners on bail was

vested by series of Statutes. The over-liberality in the exercise of the power of granting bail by the Justices of the Peace to dangerous criminals brought a Statute in 1486 (3 Henry. 7, c) wherein it was recited that persons not mainprisable were "often times led to bail and mainprise by Justices of the Peace against due form of

taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4) or section 117, sub-section (3).

Section 497 Cr.P.C.

(1) When any person accused of or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.

Provided that the Court may direct that any person under the age of 16 years, or any woman or any sick or infirm person accused of or suspected of the commission of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, enquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer, or court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for doing so.

(3A) If, in any case, triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence in the case such person shall if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing the Magistrate otherwise directs.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered the court is of opinion that there are reasonable grounds for believing that the accused is not

law, whereby many murderers and felons escaped⁽⁸⁾. So, by that Statute the power of granting bail to dangerous criminals was granted to two Justices of the Peace who were to notify in case of granting bail to the dangerous criminals to the Oyer and Terminer. The system of preliminary enquiry before granting bail as contemplated by the provisions of sections 496, 497, 498 and 499 of the Code of Criminal Procedure is traceable in the Statute of Philip and Mary (Philip and Mary. c. 13). Stephen⁽⁹⁾ observes "It was, in fact, the origin of the preliminary inquiry which has come to be in practice one of the most important and characteristic parts of our whole system of procedure, but it was originally intended to guard against collusion between the justices and the prisoners brought before them." Since the time of Edward I right upto the time of George IV, various Statutes passed in England categorised offences as bailable and non-bailable. During the reign of Victoria (11 and 12 Victoria. c. 42, s. 33) all earlier

Statutes relating to bail were repealed and offences that are bailable and non-bailable have been listed in the Statute under which a single Justice may act in granting bail. Some obsolete royal orders against Sheriff's refusal to grant bail in bailable offences came into existence in addition to writs of habeas corpus issued under the Habeas Corpus Act, 1679 by the superior courts and the Lord Chancellor. Since 1884, Justices in England in either discretion may grant or refuse bail to any person accused of felony or of any common misdemeanour except in some specific offences. The distinction between the offences, bailable and non-bailable, has been, therefore, existing in Anglo-American and Indian Criminal Law. In case of treason, no bail may be taken except by the order of the Secretary of the State or by the High Court in England.

Section 498, sub-section⁽¹⁾ of the Code of Criminal Procedure⁽¹⁰⁾ provides inter alia "and the High Court and the Court

guilty of any such offence, it shall release the accused, if he is in custody on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) A High Court or Court of Sessions and in the case of a person released by itself, any other court may cause any person who has been released under this section to be arrested and may commit him to custody.

(8) *ibid* (5)—p. 236.

(9) *ibid* (5)—p. 237.

(10) *Section 498 Cr.P.C.*

(1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced.

(2) A High Court or Court of Sessions may cause any person who has been admitted to bail under sub-section (1) to be arrested and may commit him to custody.

of Sessions may in any case whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced." Stephen⁽¹¹⁾ says "The power of the superior courts to bail in all cases, whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times. The only matters connected with it which need be noticed here are some of the provisions in the Habeas Corpus Act of 1679. This Act provides that any person committed to prison for any crime unless for treason or felony plainly expressed in the warrant of commitment may obtain a writ of habeas corpus from the lord chancellor or any judge of the common-law courts. The writ being served on the gaoler, and certain conditions being complied with it as to expenses, a return must be made to the writ within three days. Upon the return, the Judge is required to admit the prisoner to bail."

It would be now very interesting to note that by the words "and the High Court and the Court of Sessions may in any case whether there be an appeal on conviction or not, direct that any person be admitted to bail" appearing in sub-section(1) of section 498 of the Code of Criminal Procedure, 1898, superior courts, irrespective of the provisions of sub-section (1) of Section 497 of the Code⁽¹²⁾ may, as if, grant bail to any person suspected to have committed an offence of non-bailable type, punishable either with death or

imprisonment for life, as section 497(1) of the Code contemplates. Stephen, as I have already pointed out, observed that in all cases irrespective of the bailability or non-bailability of the offence, a superior court in England has the discretion to grant or refuse bail. In other words, even in cases of such non-bailable offence of the type which sub-section (1) of Section 497 of the Code of Criminal Procedure, 1898 envisages, a superior court in England has the discretion to grant bail to a person accused of a non-bailable offence of the type committed under the circumstances as sub-section (1) of section 497 of the Code of Criminal Procedure contemplates. Blackstone⁽¹³⁾ observes "Lastly, it is agreed that the court of King's bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder or any other offence, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has, therefore, provided one court, and only one, which has a discretionary power of bailing in any case; except only, even to this high jurisdiction, and of course, to all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts; or such as are committed for contempts by any of the King's superior courts of justice."

(11) *ibid* (5) p. 243.

(12) *ibid* (7).

(13) Blackstone's Commentaries on the Laws of England—16th Edition, Vol. IV, p. 298.

A question however arose before the Supreme Court of India⁽¹⁴⁾ whether the High Court has jurisdiction to grant bail to a person committed to prison by the Legislature of a State as well as to a person detained under Rule 30 of the Defence of India Rules in a proceeding arising before the High Court out of an application under Art. 226 of the Constitution of India and Section 491 of the Code of Criminal Procedure (14A). Blackstone,⁽¹⁵⁾ while discussing the power of the King's Bench or any judge of the English High Court to grant bail for any crime whatsoever, made an exception, and observed "Except only even to this high jurisdiction, and of course to all inferior ones, such persons are committed by either house of parliament so long as the session lasts; or such as are committed for contempt by any of the King's superior courts of justice." In Keshav's case the Legislative Assembly of the State of Uttar Pradesh had committed him to prison for its contempt of the House. Keshav then moved the Allahabad High Court under Art. 226 of the Constitution of India and under section 491 of the Code of Criminal Procedure challenging his committal as being in breach of his fundamental rights. He was not a member of the Legislature. The learned Judges of the Allahabad High Court who entertained Keshav's petition admitted him to bail, and one of the points which arose for decision before the Supreme Court in the special reference was whether the order passed by the High Court admitting Keshav to bail was without jurisdiction. Mr. Sreevai who appeared for the Uttar Pradesh Assembly had

strongly contended that the order passed by the High Court admitting Keshav to bail was without jurisdiction, and in support of his contention he had relied upon the English practice which seems to recognise that in regard to High Court proceedings commenced against orders of contempt, bail is not granted by courts. But the Supreme Court rejected the argument and observed "If Art. 226 confers jurisdiction on the Court to deal with the validity of the order of commitment even though the commitment has been ordered by the House, how can it be said that the Court has no jurisdiction to make an interim order in such proceeding?" Stephen⁽¹⁶⁾ observed, *inter alia*, while pointing out some of the provisions of the English Habeas Corpus Act of 1679 that this Act provides that "any person committed to prison for any crime unless for treason or felony plainly expressed in the warrant of commitment may obtain a writ of habeas corpus from the Lord Chancellor or any judge of the common law court". By Art. 226 of the Constitution of India the High Court has been conferred with the jurisdiction to deal with the constitutional validity of the order of commitment to person even though the commitment has been ordered by the House and if the order of commitment is found invalid, to release the person committed in exercise of its power under Art. 226 of the Constitution of India. So, in dealing with the habeas corpus matter under Art. 226 of the Constitution of India in regard to a case of commitment to prison of a person ordered by a house of a Legislature in India, the principle established by the

(14) Keshav Singh Vs. State of Uttar Pradesh, A.I.R. 1965 S.C. p. 745.

(14A) State of Bihar Vs. Rambalak Singh, A.I.R. 1966 SC. p. 1441.

(15) *ibid* 13.

(16) *ibid* (5).

Supreme Court of India is that the Indian High Courts having jurisdiction by the Constitution to grant a writ in the nature of habeas corpus in a matter of commitment of a person by a house of a Legislature in India have also the jurisdiction of doing all such acts or employing all such means as are essentially necessary to its execution and that as such, the Courts have jurisdiction in a habeas corpus matter arising out of an application under Art. 226 of the Constitution of India of granting bail to a person committed to prison by either House of the Indian Legislature, pending final disposal of such matter. It is to be observed that a provision similar to Art. 226 of the Constitution of India, guaranteeing to a citizen the right to move the High Court questioning the constitutional validity of the order of commitment to prison of a person, passed by either House of the Legislature in India, is conspicuous by its absence in the law of England. Therefore, the prohibition as obtaining in England in the High Court's power, as Blackstone has observed, has no manner of application to Indian High Courts in the face of the provision in Art. 226 of the Constitution of India. In Rambalak's case, Rambalak Singh was detained by the State of Bihar under Rule 30 of the Defence of India Rules. The High Court at Patna ordered the detenu Rambalak Singh to be released on bail of Rs. 500/- with two sureties of Rs. 250/- each to the satisfaction of the Registrar of the High Court. Rambalak Singh moved the High Court at Patna under Art. 226 of the Constitution of India for issuing a writ in the nature of habeas corpus pending final disposal of the habeas corpus matter. The High Court at Patna ordered release of the detenu Rambalak Singh on furnishing bail as observed above. The

State of Bihar went in appeal before the Supreme Court and contended that the order of the Patna High Court releasing Rambalak Singh on bail pending final disposal of the habeas corpus petition was without jurisdiction. The Supreme Court at page 1443 of the report⁽¹⁷⁾ observed that "when the High Court is satisfied that *prima facie* there is something patently illegal in the order of detention that an order for bail would be passed. The jurisdiction of the High Court to pass an interim order does not depend upon the nature of the order, but upon its authority to give interim relief to a party which is auxiliary to the main relief to which the party would be entitled if it succeeds in its petition. Therefore, considered as a mere proposition of law, we see no reason to accept the argument of the learned Advocate-General that the principle enunciated by this Court in the Special Reference (Keshab Singh's case) has no application to habeas corpus petitions filed under Art. 226 in relation to orders of detention passed under R. 30 of the Rules." The Supreme Court, however, while upholding the jurisdiction of the High Court in granting interim relief by way of bail to a detenu who had been detained under Rule 30 of the D.I. Rules circumscribed the jurisdiction of the High Court to pass such interim order of granting bail to the detenu within certain limits, and observed that the said jurisdiction of a High Court was inevitably circumscribed by the considerations which are subject to such proceedings and which have relevance to the object which is intended to be served by orders of detention properly and validly passed under the said Rules. The circumscribing limit for exercising the jurisdiction of the High Court for granting an interim bail to a detenu detained under

(17) *ibid* (14A).

Rule 30 of the D.I. Rules are: either patent mala fides of the detaining authority in the making of the order of detention, or patent illegality in the order passed. Either mala fides in the order of detention or the illegality in the order on the face of the record would entitle a detenu under Art. 226 of the Constitution of India to have his writ petition in the nature of habeas corpus granted, but not otherwise. So, if, on the very face of the writ petition the High Court clearly finds that the order of detention is either affected by mala fides of the detaining authority or by any other illegality, the detenu shall have his application allowed. In such a case, pending final disposal of such application the detenu can demand his release on bail. But, when a detenu challenges the order of detention as mala fide or otherwise affected by any illegality, a prima facie provisional conclusion that there may be some substance in the allegation of the detenu would not be enough for the High Court exercising its jurisdiction in granting bail to the detenu pending final hearing of the habeas corpus matter. So, the Supreme Court says that the limitation of the jurisdiction of the Court to grant relief to a detenu who has been detained under Rule 30 of the D.I. Rules inevitably introduces a corresponding limitation on the power of the Court to grant interim bail. Accordingly, what the Supreme Court lays down is that even in dealing with habeas corpus petition under Art. 226 of the Constitution of India, where orders of detention passed under Rule 30 of the D.I. Rules are challenged, the High Court has jurisdiction to grant the bail within the limits circumscribed by the decision of the Supreme Court. It is to be observed that the High Court's power of granting

bail in a habeas corpus matter arising out of a proceeding under Art. 226 of the Constitution of India is not derived from the Code of Criminal Procedure. The Supreme Court⁽¹⁸⁾ observes "If the Court has jurisdiction to give the main relief to the detenu at the end of the proceedings on principle and in theory, it is not easy to understand why the Court cannot give interim relief to the detenu pending the final disposal of his writ petition. The interim relief which can be granted in habeas corpus proceedings must no doubt be in aid of, and auxiliary to, the main relief. It cannot be urged that releasing a detenu on bail is not in aid of, or auxiliary to the main relief for which a claim is made on his behalf in the writ petition. It is true that in dealing with the question as to whether interim bail should be granted to the detenu, the Court would naturally take into account the special objects which are intended to be achieved by orders of detention passed under Rule 30. But we are now dealing with the bare question of jurisdiction and are not concerned with the propriety or the reasonableness of any given order. Considering the question as a bare question of jurisdiction, we are reluctant to hold that the jurisdiction of the High Court to pass interim auxiliary orders under Art. 226 of the Constitution can be said to have been taken away by necessary implication when the High Court is dealing with habeas corpus petitions in relation to orders of detention passed under Rule 30 of the Rules."

According to the Supreme Court, the High Court's power of granting bail in a habeas corpus matter in a proceeding under Art. 226 of the Constitution is an interim auxiliary order passed in exercise

(18) *ibid* (14A).

of the Court's writ jurisdiction, but not an order, passed under the Code of Criminal Procedure which only provides for bail. A detenu cannot be said to have committed any offence. Only a person committing an offence or suspected to have committed an offence is entitled under the Code of Criminal Procedure, but not a detenu, to bail. So apart from the provisions of the Code of Criminal Procedure and irrespective of whether a person is an offender or not, a person illegally detained i.e. a detenu under any preventive penal law, being neither an offender nor suspected to be an offender can, in a proceeding under Art. 226 of the Constitution of India while applying for a writ in the nature of habeas corpus demand his release on bail as an interim relief pending final disposal of his original application relating to habeas corpus.

In America, arrested persons are categorised in two classes, persons charged with minor offences and persons charged with moderately serious crimes who have no criminal records or any serious criminal records and who are previously of such character. There is no offence of treason in America, none so in India. Though the American system of granting bail is too liberal but the harassing system of "trading in bail by the bonds-men" keeps many persons of the above categories behind the bars. In England, the furnishing of bonds for profit or as a business is illegal and there are no professional bondsmen in England. Both under the English and the Indian systems taking bail on surety serves the most important purpose of ensuring the personal involvement of the surety in accepting responsibility for the appearance of the suspected criminal in court. The

preliminary enquiry before granting bail by courts both in England and in India requires that in accepting a recognizance from a surety the court impresses upon the surety that he would be liable for the amount of the recognizance if his principal does not appear. Therefore, the courts must be careful to make certain that the surety appreciates the extent of the responsibility he is undertaking, since bail is a delivery or a bailment of a person to his surety upon his giving (together with the person bailed) sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to gaol.(19)

Both in England and in India instances are rare, where recognizances are forfeited, that the surety is required to pay the full amount pledged. In India in granting bail to a person suspected of the commission of any non-bailable offence and of an offence punishable with death or imprisonment for life bail may be granted within the scope of provisions of section 498 of the Code of Criminal Procedure, 1898, according to the discretion of the superior court, but that discretion should be exercised within the limited conditions as laid down by the specific provisions of sub-section(1) of section 497 of the Code.

The Supreme Court of India(20), however, observes "among other considerations which a Court has to take into account in deciding whether bail should be granted in a non-bailable offence, was the nature of the offence, and if the offence was of a kind in which, bail should not be granted considering its seriousness, the Court should refuse bail even though it has very

(19) *ibid* (13) p. 296.

(20) A.I.R. 1962 S.C. 253 *State Vs. Captain Jagjit Singh*

wide powers under section 498 of the Code of Criminal Procedure." In case of non-bailable offences, other than those punishable with death or imprisonment for life, Section 497, sub-section (1) of the Code of Criminal Procedure enjoins that the High Court or the Court of Sessions or even an inferior court may, in its discretion bail a person accused of non-bailable offence, and that, even the High Court or the Court of Sessions, not to speak of any inferior court, shall not release a person if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. The wide power of the High Court or the Court of Sessions to direct any person to be admitted to bail as section 498, sub-section (1) of the Code of Criminal Procedure enjoins is, according to the principle laid down by the Supreme Court in Jagjit's case, limited by the provisions of sub-section (1) of section 497 of the Code of Criminal Procedure. Even though Stephen and Blackstone observed that a person accused of murder may be released on bail by High Court in England in exercise of its discretionary power of granting bail when it would be hard and unjust to confine a man in prison, the Supreme Court in India while explaining in Jagjit's case the wide scope of the power of the High Court and the Courts of Sessions of granting bail under sub-section (1) of section 498 of the Code of Criminal Procedure observed that bail should not be granted if the offence is of a serious nature. In Jagjit's case the offence being one punishable under section 3 of the Official Secrets Act, 1923 the prisoner on conviction would have been liable to punishment upto 14 years imprisonment. So, the Supreme Court observed "In these circumstances, considering the nature of the offence it seems to us that this is not a case where discretion which undoubtedly

vests in the Court under section 498 of the Code of Criminal Procedure, should have been exercised in favour of the respondent." In case of an offence punishable with death or imprisonment for life section 497, sub-section (1) of the Code of Criminal Procedure clearly enjoins that when a person appears or is brought before a Court he shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. So, under sub-section (1) of Section 497 of the Code, superior courts and a court of a Magistrate, while exercising the discretionary power of granting bail in non-bailable offences not punishable with death or imprisonment for life, must not exercise that power when the offence is of a serious nature, and that the superior courts i.e. the High Court and the Court of Sessions while exercising their wide power of granting bail to any person under sub-section (1) of section 498 of the Code of Criminal Procedure shall not, as sub-section (1) of section 497 of the Code enjoins, exercise its discretionary power of granting bail to a person reasonably believed to have had committed an offence punishable either with death or with imprisonment for life. But, a Judge of the High Court in England even in a murder case as Blackstone has observed, would grant bail to a person accused of murder, where sentence of death was very recently the only punishment, when it would be hard and unjust to confine him in prison though accused of such heinous offence. According to the Supreme Court's decision in Jagjit's case the superior court's wide discretionary power to grant bail to any person under sub-section (1) of section 498 of the Code of Criminal Procedure is controlled by the specific provision of sub-section (1) of section 497 of the Code, and as such, in case where a person accused is

reasonably believed to have had committed an offence punishable either with death or with imprisonment for life, no matter whether it would be hard or unjust to confine him in prison in such a case the court shall not, having regard to the specific provision of sub-section (1) of section 497 of the Code of Criminal Procedure, grant bail to such person. In case of High Court, however, it is respectfully submitted that where a person is reasonably believed to have had committed an offence punishable either with imprisonment for life or with death, the specific provision of sub-section (1) of section 497 of the Code of Criminal Procedure prohibiting granting of bail to such a person may lead to the abuse of the process of the Court and to prevent the abuse of the process of any Court, the High Court may, in spite of provision contained in sub-section (1) of section 497 of the Code when it is hard and unjust to confine a person reasonably believed to have had committed an offence punishable with either death or imprisonment for life, may, in exercise of its discretionary power, grant bail under section 498, sub-section (1) of the Code of Criminal Procedure to such person. Section 561A of the Code of Criminal Procedure among other things provides "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." Granting of bail is a process of the Court. Let us imagine a case:—A mother and a son have been charged with the offence of having committed a murder of a servant in the house. Mother is suffering from very high blood-pressure and the medical opinion is that her death may come at any moment. There is no male member

in the family except the son. Mother is an old aged lady. Under the proviso to sub-section (1) of section 497 of the Code of Criminal Procedure, the mother, a woman, may be released on bail. In such a case the question would arise who would look after the mother so released on bail whose end may come at any moment and who would arrange for her obsequial ceremonies if she died while on bail. In such a situation, would it not be very hard and unjust to confine the son in prison without granting bail even though he cannot be released on bail, in view of the prohibition in sub-section (1) of section 497 of the Code of Criminal Procedure. I have already referred to Blackstone's views that the Court of the King's Bench or any Judge thereof in England in vacation may, in case of murder, according to the circumstances of the case, in which it would be hard and unjust to confine a man in prison, grant bail and in such power of a judge of the High Court in England, according to Blackstone, lies the wisdom of law. It would be, as I apprehend, unwise for a judge where the circumstances of a case at hand, would manifestly indicate that it would be hard and unjust to confine a man in prison, though reasonably believed to have had committed an offence punishable with either imprisonment for life or death and not to release him on bail, since such an unwise step may be a manifest abuse of the process of the Court which however should be prevented by a judge of the High Court in India, as section 561A of the Code of Criminal Procedure enjoins. In England, the judges are, however, very strict in granting bail. A large percentage of persons ultimately acquitted remain without bail. England requires much less amount for bail than America does for offences of similar nature involving similar risk. The American law of Criminal Procedure invests superior

Court with the unlimited power to grant bail even in non-bailable capital cases in five States⁽²¹⁾.

Section 498 of the Code of Criminal Procedure enjoins that bail shall not be excessive and the Eighth amendment of the American Constitution makes similar provision, prohibiting fixation of excessive bail amount. The amount of bond executed under chapter XXXIX of the Code of Criminal Procedure must be fixed with regard to the circumstances of the case and must not be excessive, in view of sub-section (1) of section 498 of the Code. This provision implies and safeguards the right to bail. Its purpose is to prevent the practical denial of bail by fixing amount unreasonably high that cannot be given. A bail is excessive only if the amount required is difficult to be secured by the accused with condition of the bail. America, England and India have given wide discretionary powers to demand additional security by revising the amount of bail already granted. Section 501 of the Code of Criminal Procedure enjoins that if through mistake, fraud or otherwise insufficient sureties have been accepted or if they afterwards become insufficient the Court may issue a warrant of arrest so that the person released on bail may be brought before it and it may commit him to jail.

In exercising the discretionary power of granting or refusing bail a Court should carefully consider the following matters:—

- (a) Character of the accused,
- (b) Previous record,
- (c) Economic circumstances,
- (d) Nature of the crime charged,

- (e) Weight of evidence,
- (f) Severity of punishment,
- (g) Likelihood of jumping the bail.

Power to admit bail is a judicial power according to English and American view. Courts in India, during enquiry, trial or appellate including revisional stage, may exercise the power of granting or refusing bail as a judicial power. The Police in India are empowered to grant bail at the stage between the arrest of the suspect and his production before the Magistrate for his appearance. Orfield⁽²²⁾ says that in America the police during investigation stage may exercise its right to accept bail. In England bail may, under certain circumstances, be accepted by the Police at the time of arrest.

"Shopping for bail" is a very abusive practice prevalent in the bail system in England, America and India. If the Police refuses bail on arrest the accused may approach the Magistrate. If the Magistrate refuses to grant him bail, he may go to the Sessions Judge (District Court in America) or to the High Court, not by way of appeal, but directly as a maiden cause. Even on the refusal by the Police to grant bail the accused may straightaway approach either the Sessions Judge or the High Court without approaching the Magistrate. In India, the accused may successively approach the Magistrate, the Sessions Judge and the High Court for bail as a maiden cause and may be successively refused by each of the Courts.

Neither the requirement of bail nor pre-trial detention in default of bail, is a punitive devise. Forfeiture for non-appearance of the person bailed does not bar

(21) American Criminal Procedure, Orfield, p. 113.

(22) *ibid* (21).

prosecution for the crime. The problem is to obtain by a method that is least burdensome or injurious to the accused, reasonable assurance that he will appear at the trial. Bail benefits the accused and serves public interest as well. The accused on bail may retain his job and maintain his family and the public exchequer would not have to pay for his jail residence. Some argue that bail is socially undesirable to the extent that it may, in case of failure of the accused to appear at the time set forth for trial cause delay in trial of the case.

Refusal to grant bail, or fixation of excessive bail can be remedied in England and America by an approach to a Judge of the superior Courts—High Court or District Court, on applying for a writ of habeas corpus. In India, refusal to grant bail, or fixation of heavy bail, whether by the Police or by the Magistrate, can be remedied by an approach to the Sessions

Judge or the High Court as section 498, sub-section (1) of the Code of Criminal Procedure provides.

Mitacshara, the celebrated commentary by Vygnyaneswara on the *Institute of Yajñawalkya* as translated by Macnaghten⁽²³⁾ prescribed the system of taking surety from each party to a judicial proceeding for the satisfaction of the judgment. If a party be unable to furnish competent surety, he was to be guarded and at the close of each day was to furnish wages for the payment of his guards. So, in case of failure to furnish bail there was the provision for taking into judicial custody under the Hindoo system of judicial Procedure as prevalent in Courts in India during the very early part of the British Administration. Accordingly, failure to furnish bail, and in the alternative, jail, appears to be an ancient system prevalent in the pre-trial procedures of most of the civilised countries of the world.



NOTHING BUT THE TRUTH

A witness protesting too much observed that he had been wedded to truth since his birth, when Lord Darling asked him, "And how long have you been a widower?"

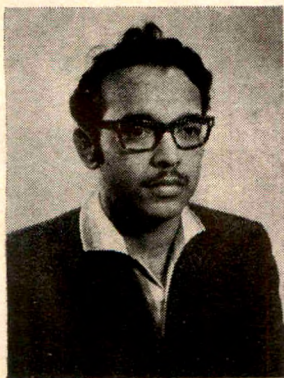
(23) F. W. Macnaghten's *Institute of Hindoo Law*, 1824 Edn., p. 418.

Annual Social Function

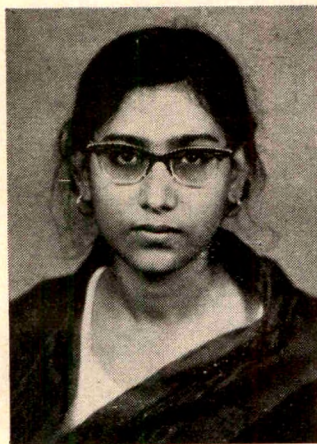


Hon'ble Mr. Justice B. C. Mitra (Chief Guest) addressing the gathering. On his left are Dr. B. N. Mukherjee, Offg. Principal (President of the function) and Prof. N. D. Roy (Union Vice-President). On his right is Prof. Ajoy Ghosh (Union President).

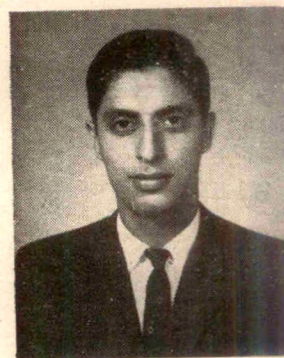
OUR DEBATORS



SUJOY CHAKRAVORTY
Winner of All India Law
Colleges Competition held
at Allahabad.

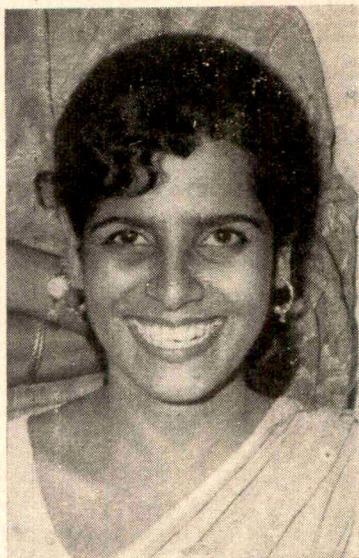


MANJARI AICH BHOUMICK
Winner of prizes in many
All-Bengal competitions
(in Bengali)



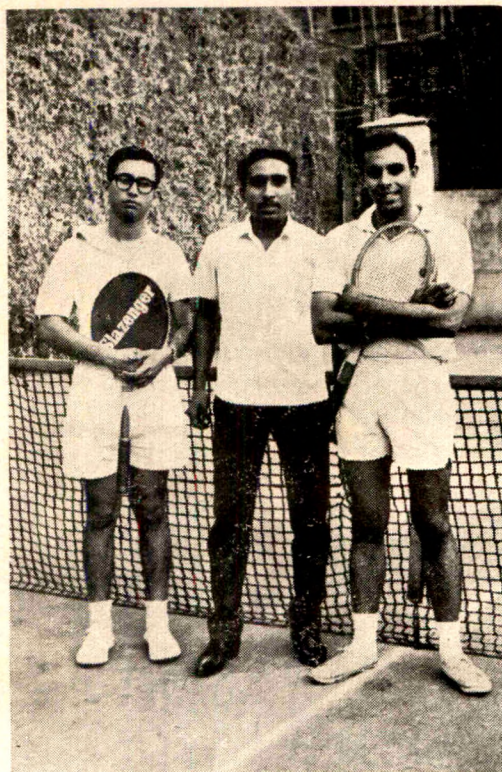
VIJAY LALL
Winner of All India Law
Colleges Competition held
at Allahabad.

SKY IS HER LIMIT



DIPALI SINHA
Pioneer in Mountaineering
 (First Lady to complete Advanced
 course in Mountaineering).
Prolific in Flute-playing
 (First in Inter-Collegiate
 Competition, 1966)
Proficient in Stage-acting
 (Member of winning Hindi female
 Drama team of our College)

OUR LAWN TENNIS HEROES



B. K. ROY (left) & BOBBY MEHRA (right).
 Calcutta University Lawn Tennis Champions—
 with
 P. MAZUMDAR (Jl. Secy.)

OUR STARS



In Hindi (Female) drama who lifted Inter-Collegiate Drama Championship
 Trophy for the first time in the history of our College.

India's Population Explosion & Impending Legislations

AMAL KUMAR DE, M.Sc. (TECH.)

(Final Year Law Student)

When India was liberated two decades ago from the age-old shackles of imperialist domination, a number of deep-rooted evils had already sapped the vitality of our nation and eradication of those evils posed a grave problem to our Planners. Untouchability, ignorance, illiteracy, superstition were rampant among the teeming 350 million Indians. The level of consumption, private incomes and savings were all extremely low. Shortages were universal, there was not enough food to go round and not enough houses to meet the needs of an expanding community. The prices of essential commodities were rising and on the other hand, the partition of India caused considerable damage to India's economy. To make India emerge as a welfare state, at least the basic necessities of life—food, clothing, shelter, education—were to be provided to the people, 90% of whom were poor and having the barest means of subsistence. It was therefore necessary to increase the food production and very aptly emphasis was placed on agriculture in the First Five-Year Plan. The main aim was to attain self-sufficiency in food as much as possible and put a stop to the import of food-grains from other countries. Success in some measure was achieved on the food front and our Planners, shifting the emphasis on industrialisation in the over-ambitious Second and Third Five-year

Plans, never tried seriously to bridge the ever-widening gap between population growth and food output. These Plans depended too much on deficit financing and this disturbed our balance of exchange position. Beyond the spark of prosperity achieved by industrialisation now lies the abysmal darkness in our pathetic dependence on food imports through PL-480 and other loans, bringing the country on the verge of bankruptcy and economic, though not yet political, subjugation by richer countries of the world.

Is India over-populated ?

During the first ten years of Independence the question—"Is India over-populated?"—was widely discussed and almost always the answer was in the negative, after considering the productivity of the cultivated lands as well as that of the arable lands lying barren and fallow till then, the application of modern methods of agriculture and provision of various land reforms leading to the uplift of rural community and increased food production. Malthus with his population theory was cast aside and hope gleamed in Indian eyes. During the next ten years the hope gradually gave way to despair as India, now on the path of industrialisation, found herself delving deep into the gorge of in-

flation and acute food shortage. The spectre of hunger now stares straight into our eyes and we are rather prompted to answer the same question—"Is India overpopulated?"—in an emphatic positive.

A Comparative Study of Population Figures

In order to assess the magnitude of the problem we must study India's position in the whole world in the context of population growth. As a single country, India has the second largest population in the world, next to China. It might be heartening to know that every sixth human being on this globe is an Indian, but it is equally disconcerting to find that India occupies only 2.2% of the total land area of the world. In Asia, next to Japan, Lebanon and Korea, she has the highest density of population. The population of India is more than the combined population of North America and South America. If we want to compare ourselves with the two richest countries of the world viz., U.S.A. and U.S.S.R., we find that the total number of people in U.S.S.R. and U.S.A. put together is slightly less than the total number of people in India. But the land area in these two countries is nearly ten times as large as India. These statistics only reveal the grim and desperate situation we are in.

Magnitude of the Population Problem & Family Planning Drive

During the two decades since Independence the population growth was not, or perhaps could not, be checked for diverse reasons. The family planning drive never gathered momentum due to illiteracy, conservatism, lack of proper propaganda machinery and perhaps due to undue complacency on the part of our Planners. The

population in these twenty years has jumped from 350 millions to 500 millions, showing an increase of about 2% per annum or an extra 80 lakhs of new mouths, equivalent to the population of New York city, to be fed each year. The United Nations Demographic Year Book (1967) provides certain useful informations on India which may alarm even the most optimist mind. The Year Book says that India with the present rate of population increase of 2.4% will overtake China, whose corresponding figure is 0.5% as the world's most populated State by the year 2012. With these rates of population growth, China's present population of 710 million will double by the year 2012 but India's present population of 500 million will have trebled by then.

A rather belated appraisal of the situation has led our Government to constitute the Central Family Planning Board in 1956 and State Boards and District Committees having about 16000 Family Planning Centres under them. The Central Family Planning Institute at New Delhi was established in 1962 mainly for the advancement of knowledge in various aspects of Family Planning movement in India i.e. Educational, Social, Medical, Biological, Statistical, Demographical, Organisation and Supply. The Regional Family Planning Centres have taken upon themselves the monumental task of educating the masses through audio-visual publicity, folders, booklets, posters etc.

Causes for Increase of Population

What are the causes behind the phenomenal increase of population? The increase has been mainly due to the following reasons:

Elimination of famines, epidemic and wasting diseases like malaria, general im-

provement and economic development in the country. Although the birth rate has not fallen appreciably, the death rate has fallen steeply. The expectation of life at birth which was only 27 in 1931, is now 45 due to fall in the death rate.

But still certain other factors need investigation when we notice that the rate of population increase is much less in cities and towns than in the villages. We are inclined to believe that illiteracy, ignorance, absence of recreational facilities and religious or moral taboo in discussing family planning methods are the root causes of the higher rate of increase in villages. This belief is confirmed by a census taken on the rural population in 50 West Bengal villages in Hooghly district recently. It is reported that about half the number of babies born in a month were those belonging to mothers who already had three or more children. The Census Report has described these cases to be examples of 'Improvident Maternity' as here the aim of family planning to prevent large families is frustrated. The Report further states that the youngest mother to have given birth to a child was a girl of 15 while the oldest among the women to have given birth to a baby was 52 and was already a mother of five children; the highest order of births recorded was 11, the case of a mother having given birth to her 11th child in that particular month under review. She is 40 and illiterate; among her previous ten children, only five are still alive. The overall prevailing birth rate in these villages is 32 per 1000 per year.

The picture is not very different in villages and shanty industrial towns anywhere in India. Poverty and slums, absence of healthy recreations and ignorance hatches mental and moral degenera-

tion and children are born into a family unwanted even against their parents' wishes and remains uncared for, making themselves a burden to the family and to the society at large. The family planning drive has yet to achieve a real measure of success and to play its vital role in pulling the nation out of the cauldron of such misery and despotism. In remote villages and backward areas, the men and women follow meaningless and harmful customs and are impervious to or fearful of the modern methods of family planning such as vasectomy or sterilization. Even willing couples fight shy of taking such steps, because the rural society, as a whole, has remained unenlightened or much less progressive.

Some Proposals for reducing Birth-rate & their Criticism

Such state of affairs has led the Government to view the whole subject in a new light. To check the alarming increase in population and the corresponding, though not resultant, deficit in available food per capita, the Government now not only spends more on research in inventing cheap contraceptives and on studies of reproductive biology, but also is thinking seriously to adopt a policy by which an element of compulsion is introduced in place of 'voluntary' family planning methods adopted in the past. But there has already been strong reactions urging the Government to withdraw the proposal for compulsory sterilization and also to do away with the practice of monetary incentives from the national family planning programme. But it is really a matter of regret that such critics advocate, as an alternative, the Gandhian principle of self-discipline, which like so many good things of the past, is utmoded and unscientific in the present context.

The other proposals which may come up for strong criticism by the so-called conservatives are legalisation of abortion and enhancement of permissible marriageable age (resulting in reduction of reproductive period) of girls to 21 years. These are certainly the alternative methods of checking the population explosion and a Bill to these effects may be introduced in the coming winter session of the Parliament.

Existing Legal Bar on Abortion

An enunciation of the relevant provisions in the Indian Penal Code with reference to abortion (or miscarriage) will be pertinent in the present context as such laws will come up for discussion and will either be amended or repealed before putting the seal of legal validity on abortion. These provisions are as under:

Sec. 312: Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years or with fine or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation—A woman who causes herself to miscarry is within the meaning of this section.

(This section deals with the causing of miscarriage with the consent of the woman)

Sec. 313: Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(This section deals with the causing of miscarriage without the consent of the woman)

Sec. 314: Whoever, with intent to cause the miscarriage of a woman with child, does any act, which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if the act is done without the consent of the woman, shall be punished either with imprisonment for life or with the punishment above mentioned.

Explanation—It is not essential to this offence that the offender should know that the act is likely to cause death.

(This section provides for the case where death has occurred in causing miscarriage)

Sec. 315: Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die

after its birth, shall, if such act be not caused in good-faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

(The offence which this section punishes is the injury to the child's life).

Sec. 316: Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(This section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening, and where the death is caused after the quickening and before the birth of the child).

Legalisation of abortion will be one of the effective methods of reducing the birth rate as has been proved in Japan where the birth rate has dropped to half. According to the Union Health Minister, Dr. S. Chandrasekhar, though legalised abortion is not an effective answer to birth control; it is one of the many measures the Government wants to adopt to restrict the birth rate. As recurring pregnancy tells severely on the health of under-nourished mother as well as the new-born child, as is the case in many poor families, Dr. Chandrasekhar's approach to this issue is one of 'sympathy' for those who need such protections. "The men who make laws for the

country should have the grace and courage to make laws which are acceptable and beneficial to the women", he says. In support of the laws for liberalisation of abortion in cases of those couples who already had three children, he has cited that according to Government's own estimates, nearly four million women undergo abortion every year, mostly at the hands of quacks and unqualified practitioners.

Such laws, if enacted, will have far-reaching sociological, physiological and psychological effects. While some fear a depletion of moral values on legalisation of abortion, others point out the physiological and psychological effects of abortions on the mother, but they still feel that it is advisable to allow women who so desired to get aborted. Still others enumerate the hazards, in the event of legalisation of abortion, particularly in a country where there is one doctor for a population of 5,000. According to them, even on conservative estimates a doctor would have to perform a feat of five abortions a day. To tackle this problem Dr. Chandrasekhar has proposed to bring in, in consultation with the State Governments, another Bill to regulate the unregistered practitioners in the country, who according to him, number over 40,000, and at the same time to eliminate the quacks. But, apart from this, the Government must arrange to render medical aid to vast rural population at a cost which the people can afford.

The proposal for legislation to raise the age of consent for marriage of girls has came under fire not only on moral grounds but also on the statistical ground showing that women in the age group of 21 to 29 bear more children than in the so-called more fertile span of 15 to 20 years of age. Such critics maintain that in countries where the age limit for marriage is fixed

by law, the reduction in population growth is not the direct consequence of this law but is the result of social changes and social attitudes to women.

Meanwhile, Dr. Chandrasekhar has other proposals to make the family planning programme a success. He has suggested that just as by law employers are responsible to submit accounts for the income-tax of their employees, they should similarly be held responsible to ensure a limitation on employees' families. He has further suggested that State legislatures and other representative institutions of the people should "pass and recommend drastic laws" on family planning. He says that he will personally welcome it if State Governments, enjoying the confidence of the people, withdraw concessions from their employees and other facilities from citizens, who have more than three children.

It is only hoped that such 'drastic laws' will have the desired effect in checking the population explosion which has posed a threat to the very survival of the country. But nothing can be achieved by legislation alone if public support is not mustered behind it. Is not the time for re-assessing our moral and material values already overdue? Should not the society be stripped off the unhealthy shell of unwanted social conventions and traditions now? The general abhorrence in discussing physiological and psychological aspects of sex should be removed by introducing compulsory studies on these matters even in the pre-University stage. Particular stress should be on the education of girls to propagate the small family norm. Education of the masses for limiting the family and thus to put the nation in the path of prosperity will be no mean task and we must be prepared to accept this challenge for our own benefit.



WELCOME ADDRESS

Governor Hunt of Wyoming tells this story of himself. He visited the State Penitentiary one day, and when the prisoners assembled for the midday meal, the warden unexpectedly asked him to make a few remarks. Without thinking he began, "Fellow citizens, . . ." Their smiles reminded him that all of them had lost their citizenship when they were convicted. He tried again, "Fellow convicts, . . ." This was even worse. As a last resort he explained hastily, "Well, men, I do not know how to call you, but I am *certainly glad* to see so many of you here."

Evolution of Socialist Laws in U. S. S. R.

KUMAR DIPTI SEN GUPTA, LL.B. *Advocate*

(Not many of us are so intimate with a socialist legal system as we are with other systems. In this article, the writer has delineated the development of the Soviet Legal System (as particularly evident in Criminal Jurisprudence) since 1917, when the epoch-making October Revolution took place in Russia. The publication of this article is timely, as the present year coincides with the 50th year of Revolution

—Jt. Editor).

Since the year 1918, there have been many changes in the Soviet legal system. The present legal system is altogether different from the law as it stood in the first quarter of this century. The basic approach for the Soviet legal system is protection of socialist property and to educate the people to eradicate the crime. These principles have been laid down from time to time by the Soviet Jurists. If the process of evolution of law in the U.S.S.R. and the principles involved therein are studied and its effects considered, it will be seen that like many other countries inspite of many criticisms, supremacy of law is the guiding principle in that country.

On February 22, 1918, the Russian Revolutionary Government decided that laws of the period of Czar regime would continue unless those were "contrary to the legal conscience of the workers". On July 20, 1918 there was change in the concept and

for the first time the principle of dispensing of justice in consonance with "the socialist legal principles" was laid down. On November 1918, laws of the previous regime of Czar were made inapplicable. New laws consistent with socialist outlook were enacted relating to family, labour and land. In the year 1922, codification was done and that is the legal structure of the Russian Soviet Federal Socialist Republic (R.S.F.S.R.). Civil Code of the R.S.F.S.R. came into force on 1st January, 1923. The principles of Soviet Civil Law has been embodied in 1936 Constitution of the U.S.S.R. Matters governing material relations between private persons, between socialist organisations in economic matters are covered by the Civil Code, which guarantees and confers private rights consistent with the socialist system. The common notion that Soviet system cannot offer incentive to individuals in the matter of creations or discoveries is not justified if we consider the

copy right law. It safeguards the corporeal or incorporeal rights of the authors. The author only can publish or reproduce his work but translations can be made without the author's consent. In the Civil Code principles of contract are also recognised for the purposes of sale, lease of property, purchase of things, delivery of goods, loan etc. Other important legislations are Constitutional Law, Administrative Law, Labour Law, Land Law, Collective Farm Law, Finance Law, Family Law.

The present studies are confined to matters relating to Criminal Law. So let us see what are the basic principles adopted for framing these legislations and whether any discrimination was made between individual and individual or socialist organisations. "Bukharin referred to revolutionary legality in 1929, and believed that it would end all forms of arbitrary administrative action even on the part of revolutionaries themselves".¹ Lenin wanted that law should be applicable uniformly throughout the country. However the legislative codes of 1922 according to many legal experts of the Soviet Union fell short of the desire to establish a new legal system consistent with the revolutionary changes in that country. Stuchka, a Soviet legal authority, in 1923 laid down "Communism means not the victory of socialist law but the victory of socialism over any law, since with the abolition of classes with opposing interests law will disappear altogether."² Another Soviet Jurist Pashukanis also said

"The withering away of the categories of bourgeois law can in no circumstances mean their replacement by new categories of proletarian Law". From time to time legal experts of the U.S.S.R. were busy propounding the theories of "revolutionary legality" but ultimately the principle of "socialist legality" has taken the place of "revolutionary legality" and it means justice and equality for the people of U.S.S.R. "The socialist State provides the essential firm guarantees whereby human existence is assured"³ is the expression used by George Lukacs in 1963 while making comments on socialist legality. The principle that law is no respecter of person and it has got to be obeyed has been unequivocally declared by leading Soviet lawyers or jurists like B.A. Rudenko, Strogovich, Perlov and Rakhumov. There are various definitions for describing the aims and objects of socialist legal theory. According to K. Polak of the German Democratic Republic it is: "The socialist State and its law are the levers for the achievement of socialist social relations and thereby of the standards of socialist social order".⁴ According to a decree of the National Council of the German Democratic Republic as passed on 4th April, 1963 "Socialist law gives expression to the objective operation of the laws of socialism not merely to revise the operation of a single field of law, namely judicial law; its purpose is to achieve socialist relations in society, to put into effect the basic laws of society underlying such relations, consciously to imple-

(1) Vladimir Gosvski, Soviet Civil Law, Vol. I, p. 162.

(2) Vladimir Gosvski, Soviet Civil Law, Vol. I, p. 170.

(3) George Lukacs—"The Debate between China and the Soviet Union" in Form (Vienna), November, 1963, p. 519.

(4) K. Polak, "State & law—The Instrument for the achievement of Socialist Social Relations in Einheit (East Berlin, 1963) No. 7, p. 75.

ment those laws in the over-all development and application of the law".⁵ Like the political philosophy the socialist legal system aims at evolution of classless society. According to it, criminality is "The remnants of capitalist mentality in human consciousness". Apart from these definitions, the important thing is how to put a stop to criminal actions and in doing so what should be the relationship between the party and the courts as many people apprehend that courts in U.S.S.R. are subject to party control and legislations are adopted with a view to perpetuate party control. Vyshinsky, a former Procurator General expressed that, if necessary, party's directions were to be obeyed by the judges and departure from the law might be done.⁶ It means that it is an end to the rule of law and uncertainty for every thing and everybody. If we scrutinize the present position, then we will see that things have completely changed. Even the much debated principle of dispensing justice by analogy has been abandoned. In the criminal code of the R.S.F.S.R. of 1922 and of 1926 in Sec. 10 and in Sec. 16, it was laid down. "If the code does not specifically refer to a particular anti-social Act, the principles and limits of liability for such act shall be determined in accordance with such sections of this code as refer to criminal acts most closely related to those in question". Kursky and Krylenko, two eminent jurists pleaded that the above

principle could be followed only in the case where no punishment was provided for "merely by oversight or through faulty drafting". But the authorities of the Soviet Union did not allow this lacuna to remain and it was abandoned in 1956 after the 20th Party Congress. Sec. 3 of the Criminal Law in U.S.S.R. and the Union Republics and also sec. 3 of the Criminal Code of the R.S.F.S.R. of October 27, 1960 set at rest for all time the controversy.

According to Krylenko, former Procurator-General of the U.S.S.R.:

"We do not want to be thought to advocate mere judicial independence in its earlier forms. We believe the judiciary should be wholly dependent on State policy and the representatives of the State. But we wish to place the judiciary in a situation where their strict adherence to State policy and to no other can guarantee their being able to carry out that policy within the framework of the law and independently of extra-judicial factors".⁷ At present, the party cannot influence the decision of court. Previously interference in Court's work in particular cases were alleged. But intervention in courts' work has been condemned. Pavlov in 1963 writes, "It must be added that certain party committees are still on the wrong track. They demand the right to intervene directly in specific cases and to dictate their ideas regarding guilt and punishment to the courts".⁸

- (5) "The VIth SED Party Congress and the Tasks of the German 'Walter Ulbricht' Academy for State Questions and Jurisprudence" in *Staat und Recht*, 1963, p. 1065.
- (6) Michel Rigin, 'Socialist Legality: Yesterday and To-day' in *Ostenropa — Recht*, 1961, p. 97.
- (7) N. V. Krylenko "Structure of courts in the U.S.S.R.", quoted by Strogovich in *Handbook of Soviet Criminal Procedure* (Moscow, 1960) p. 76.
- (8) I. Pavlov, "The leading Role of the Communist Party in consolidating National Legality", in *Sotsialist Icheskaya Zakonnost* (Moscow, 1963) No.

The Supreme Court of the U.S.S.R. on March 18, 1963 laid down, "The Constitution stipulates that the administration of Justice in the U.S.S.R. can be carried out by the courts only, and that no one can be declared guilty of a crime and subject to criminal punishment in any other manner than according to the verdict of the court; this constitutional requirement imposes upon the court full and complete responsibility for the final decision in every criminal case. It is the task of the courts to secure a thorough, complete and objective investigation of facts in each criminal case and to pronounce lawful, substantiated and just verdicts on the basis of the law, in accordance with socialist jurisprudence and under conditions which exclude any external influence upon the judges."

Another allegation of subordination of judiciary by the Ministry of Justice has been dealt with by the present law-makers in a way which will satisfy the conscience of persons interested in the supremacy of law. Previously the Ministries of Justice used to indicate "specific or general indications or guide-lines on what should be contained in their decisions."⁹

Polyansky writing in Moscow University Journal (1950) stated, "The directives issued to Soviet courts, on the other hand, may go deeply into political and economic problems."

This practice has been abandoned in the 20th Party Congress in 1956. At present the Supreme Court of the U.S.S.R. like Supreme Courts of all other countries guide and control the activities of the courts. The presidium of the Supreme Court on 15th June, 1963, observed that

the laws were not applied correctly by the judges or the sentences were not either adequate or commensurate with the crime committed especially in sexual offences. The presidium of the Supreme Soviet in the months of May and July, 1961, amended certain punishments and ordered death penalty for "serious theft of State property and for counter-feiting money" or for offences relating to "currency and securities speculation." In December 1961 for "careless use of agricultural machinery" and "failure to carry out repairs" punishments were provided for. In Soviet Union, every citizen must safeguard socialist property. Thus it appears that for offences relating to State properties, severe punishments are provided for. The above legislations were passed under Sec. 49(b) of the Constitution, which confers a right to adopt legislations very quickly by the Presidium of the Supreme Soviet after obtaining concurrence of the Central Committee instead of the usual method of adopting laws by the Supreme Soviet of the U.S.S.R. These actions have been interpreted as interference by the party in power. But as a matter of fact it is a distinction without difference, for the Presidium of the Supreme Soviet enjoys the confidence of the Supreme Soviet of the U.S.S.R. In many countries, the President of a State issues ordinance, of course, in case of emergency on the advice of the cabinet ministers without placing the matter before Parliament. So it cannot be said that ruling party in the Soviet Union arbitrarily passes legislations for in all the countries it is the party in power who enjoys the confidence of the people and which is responsible for passing legislations for the benefit of the people.

(9) Reinhard Manrach, *Mandbuchder Sowjetischen Verfassung* (Munich, 1955) p. 309.

The functioning of workers' collective or comradesly courts have not been liked and many jurists outside U.S.S.R. want to call them as organs to maintain party control. But the need to people's participation in the matter of dispensing justice is becoming very much necessary for effectively dealing with criminals especially in petty cases. Comradely courts deal with simple matters relating to "violation of work discipline, e.g. bad time keeping, drunkenness, absence without proper reason, petty theft, failure to carry out one's duties with regard to the education of children" etc. and "other anti-social actions not punishable under the criminal law".

Trade Union movement in many countries is defective. The labour unions agitate only for the increase of wages without caring for the efficiency in the work resulting in huge loss of man-hours when the country needs their assistance. In Soviet Union, "socialist legality" not only ensures this but also directs the labourers to pay attention to the education of their children. Law is not something abstract. It plays important role in moulding and building the nation. These courts are targets of attack for according to many through these types of organisation, the ruling party maintains its hold. The same argument may be advanced in respect of other countries too, for in many cases for running a State, quasi-judicial bodies are formed where persons inclined towards the ruling party, are nominated. Moreover if these petty cases, which to some extent are administrative responsibilities, become subject-matter of litigation, then "it is not known to what an alarming

extent the flood-gates of litigation will be opened in a country". Rather it can be said even in petty cases, the matter does not rest with the administrators but is dealt with by a court which again proves the desire of the Soviet People to extend the jurisdiction of the court when in modern legislation in countries boasting of liberty and freedom there is a tendency to curb the jurisdiction of the courts, especially the Civil Court. Other "anti-social actions not punishable under the Criminal Law" have been defined as "according to the evolutionary process of communist morality in a socialist State, new forms and rules of conduct which emerge from life are accepted in the progressive section of society before they acquire general currency and finally become truly part of the heritage of the whole people."¹⁰

From above it will be seen that in U.S.S.R. great efforts are made to maintain the supremacy of law and to administer justice by the rule of law; so, the criticism that in the U.S.S.R. observance of law is exception and it is observed more in breaches than in observances is not justified.

In the Soviet Union every citizen is expected to do some useful work and nobody is allowed to lead "parasitic life". Hence the anti-parasite law has been passed on the 4th May, 1961. Here it can be seen that the legal system of that great country compels its citizens to be useful to the society and to assist the nation to achieve their political goal i.e. establishing a classless society. The persons involved are ordered to be "settled in specified places and required to work at the place of re-

(10) "Towards the creative Development of Marxist Leninist Ethics"—in Voprosy Filosofii No. 2, 1963.

settlement". Section 3 of the decree of the Presidium of the Supreme Soviet of the R.S.F.S.R. relating with anti-parasite law lays down "when an investigation has been completed the evidence is transmitted to the district people's court or to the workers' collective, subject to the authorisation by the Procurator's office". Previously in the years between 1957 to 1959 in the Act as it stood there was not much judicial control and the party-cells through social organs have some control but after the Act of 1961 district people's court, a judicial body, can decide the matter. Legislations in U.S.S.R. are specific and not vague as suggested. It is argued that in the anti-parasite law the word "other anti-social actions" have been described as too vague so that there may be abuse or excess. But that particular word can never be disintegrated from the section as a whole and no court will possibly convict a person who does not lead a parasitic existence simply because of this vagueness. By an ordinance dated 3rd July, 1961 and amended on October, 1961 and further amended on October, 1963, very nominal punishments in the shape of "warning, reprimand with or without publication in the press, fine upto 10 roubles" etc. could be passed by a comradesly court. These courts deal with petty offences. There should be no objections to decide petty matters by people's participation and in India many labour disputes are amicably settled between workers' representative and employer's nominee. The Naya Panchayet as will be formed or already formed in India will be administered by people's representatives for decision of petty cases. The Supreme court of the U.S.S.R. on March 18, 1963 laid down certain principles regarding the working of anti-parasite laws consistent

with the laws as it found instances of misapplication of the law or of improper award of sentence. So it is the Supreme court of the U.S.S.R. which guides the actions of the lower courts and the party has nothing to do with them. It is said that too much respect is shown to officials by these courts. This criticism is echoed in other countries too. Soviet Union is no exception. It depends upon the bench and no system is responsible for this.

Another object of criticism is the application of penal provisions retrospectively unknown to conventional judicial system. Art. 11 para 2 of the Universal Declaration of Human Rights lays down:—"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed." The retrospective application of law in specific cases by the presidium of the Supreme Court is disapproved by many jurists outside U.S.S.R. But the basic approach towards such application is to be scrutinised. Grzybowski states that "The centre of legal order is not the bill of rights contained in the socialist constitutions. It is, rather the economic plan administered by the party".¹¹ G. Z. Anashkin, President of the Criminal Collegium of the U.S.S.R., Supreme Court stated regarding the application of the law retrospectively:—"A Law that lays down a punishment for an act or increases a punishment is not as a general rule retroactive. In court practice there have been individual instances when a court applied a law retroactively, but only when the pre-

(11) Grzybowski, "Soviet Legal Institutions" (Ann Arbor, 1962) p. 178.

sidium of the U.S.S.R. Supreme Court has given a ruling on the specific case, allowing the court to apply a law retroactively against the particular individual who has committed an especially grave crime."¹² However the provisions are invoked only in exceptional cases.

Regarding the election of judges in the U.S.S.R. there is divergence of opinion. The judges in the U.S.S.R. are elected. As such their appointments can be terminated. Their actions and activities may be considered by the electorate. According to some it will hamper the efficiency while others think it will ensure efficiency. On the 26th July, 1962 the Presidium of the Supreme Soviet of the R.S.F.S.R. laid down "That the representatives of social organisations should be invited to all hearings involving confiscation without compensation of houses, dachas and other structures built or acquired with unearned income or through the illegal use of funds of State undertakings or collective farms".¹³ "Social prosecutors" or "social defence Counsel" are also allowed to make their submissions. This is done to ensure more co-operation by the public and also to assess their view point. It is believed, anti-social acts may be put to a stop because of increasing public co-operation. Their principal functions are, "to state the opinion of their collective regarding the offence and the defendant, to help the court to examine the facts and to find a just solution and to assist in mobilizing the forces of society in order to prevent further offences and help in the education of offenders".¹⁴ According to Mrs. A. I. Stavtesva, Head of the Department of Labour Law, Lomonosov Univer-

sity "Offenders who would even prefer dismissal, rather than appear before the court composed of their fellow workers are are not few". This is an example amongst many others of the improvements as effected in the realm of law and a positive proof of introducing new methods to eradicate criminality which may be wanting in the conventional legal system. In the Soviet land since the days of revolution there is an attempt for all these years to introduce rule of law, to extend its sphere, to control the actions of the administrations, to protect the citizens against arbitrary actions. Since 1922 there is always a constant attempt in that direction.

V. I. Lenin felt the need of codified legislation and in September 1922 he expressed like that. From 1922 to 1956 the legal system of the U.S.S.R. has undergone many important changes entailing far-reaching consequences. Jurisdiction of courts was enlarged and administration became subject to judicial control. Office of procurator was introduced. His powers are very wide. Any citizen who feels aggrieved because of a judicial decision or for an official act may inform the procurator who, if necessary, can take suitable steps for offering assistance to the individual concerned. This is in addition to the ordinary law of seeking justice. The anxiety of the jurists all over the world to maintain the supremacy of law is well-reflected in an article published in the year 1957 by P. E. Nedbailo when he states "The legal position of the court, its functions and its strictly defined activity create favourable conditions for ensuring the correct application of legal norms as no other

(12) The Current Digest of the Soviet Press, Nov. 6, 1963, p. 10.

(13) The Current Digest of the Soviet Press, Nov. 7, 1962, p. 23.

(14) Decree of the State Council of the G.D.R. dated April 4, 1963, part—1, IV-C, Sec. 2.

form of state activity can. Therefore, within the system of legal guarantees, judicial guarantees are the highest guarantees of the rights of citizens. Hence, one should draw the practical conclusion that it is necessary to broaden the jurisdiction of the court, to raise its role and prestige in public life. In particular, in our opinion, the functions of the court should be extended to deal with the administrative activity of Government agencies in their relation with

the populations".¹⁵ All these go to show a definite improvement in the realm of law in U.S.S.R. The present position, as discussed, bears a very close resemblance to the basic principles of justice as is known to all. The need of rule of law is the concern of everybody and acceptances of this principle by different nations following different ideologies is a dazzling silver line in an otherwise gloomy atmosphere prevailing in the present-day world.



EXPERT IDENTIFICATION

The magistrate glowered down at the man in the witness box. "You say this man robbed you," he said heavily, "can you pick out any of your property from this heap of articles found on the prisoner?"

"Yes, that is my handkerchief with 'D' in the corner," said the witness.

"But that is no proof, man" snapped the magistrate, "I have a handkerchief with 'D' in the corner."

"Well," mused the witness, "I *did* lose two handkerchiefs."

**ACTS, RULES
AND
ORDINANCES**

BAR COUNCIL OF WEST BENGAL

Rules under section 28(1)(b) read with section 24(1)(d) : Training and Examination

1. No person who is otherwise eligible to be admitted as an Advocate under section 24 of the Advocates Act, 1961, but who has not been exempted from the application of sub-clause (d) of section 24(1) shall be admitted as an Advocate on the Roll of the Bar Council unless he has after his graduation in law or call to the Bar, as the case may be, undergone a course of training in law, attended a course of lectures if and when arranged and passed an examination after the training and the lectures in the manner prescribed:

Provided that a person, who commenced practical training under the Indian Bar Councils Act, 1926, before the 1st day of December, 1961 and has completed one year's training, shall be exempted, from undergoing the training and attending lectures under these rules; and further, he may be allowed to appear for oral examination before a committee of three members of the Council to be nominated by the Chairman, and on his passing the said oral examination shall be exempted from the examination provided by these rules.

2. In the rules hereinafter following—
“A candidate” shall mean a graduate in law or a Barrister (as the case may be) otherwise eligible for admission under section 24(1) of the Advocates Act, 1961;

“An Advocate” shall include an attorney enrolled as an Advocate; and

“Receiving training” shall include reading in Chambers of an Advocate, as hereinafter provided.

TRAINING:

3. The Course of training in law shall consist of receiving training for a continuous period of 6 months from an Advocate ordinarily practising in the High Court, the City Civil Courts, the Presidency Small Causes Courts, the Presidency Magistrate's Courts or the District Court or Sub-Divisional Court.

Such Advocate shall be of not less than 10 years' standing and (i) whose name appears on a list, maintained by the Bar Council, if any, or (ii) whose name is approved by the Bar Council before the candidate commence such training.

For the purpose of computing 10 years' standing of an Advocate, his standing as a pleader, vakil or an attorney shall be taken into account.

4. No candidate shall receive training with an Advocate who has, at the time of the commencement of receiving training, two other candidates except with the previous permission in writing of the Bar Council.

5. Every candidate before receiving training with an Advocate shall send to the Bar Council an intimation in writing of the name of the Advocate from whom he desires to receive training, together with the consent in writing of the Advocate concerned in the form prescribed.

6. The period of training shall be deemed to commence from the date of the receipt of intimation by the Bar Council referred to in rule 5 unless the Bar Council otherwise directs.

7. Every candidate shall be bound to receive training for the period of 6 months under the same Advocate except where the Advocate has before the expiry of the period of 6 months ceased to practise in which case the candidate shall receive training with another Advocate for the residue of the period provided such other Advocate is of not less than 10 years' standing and is on the list, if any, maintained by the Bar Council or is approved by the Bar Council in writing, if necessary, and provided further that he shall have given to the Bar Council an intimation in writing previous to his receiving training with such other Advocate, together with the consent in writing of the Advocate concerned in the form prescribed.

8. During the period of training, the candidate shall regularly attend in Chambers or office of the Advocate, study case papers, correspondence, draft pleadings, attend court and in particular study cases with a view to getting acquainted with the practice and procedure in Civil and/or Criminal and/or Original and/or Appellate work.

9. (a) Every candidate shall maintain two diaries one for works done in Chambers and another for works attended to in

Courts. The Chambers Diary shall contain a day to day record of the works done by the candidate in the Advocates' Chambers giving shortly the facts of the case studied of complaints, written statements, affidavits, grounds of appeal or revision, etc., read and other matters looked into. The Court Diary shall contain the date, the number of the cases attended to, the arguments and the result of the cases. The candidate shall write out on the first page of each of his diaries his name, serial number, the name of the Advocate, the place of training and the date of commencement of the training. The diaries maintained as above may be called for by the Council and/or any committee thereof for the purpose of ascertaining as to whether the same have been properly maintained.

(b) Every candidate shall submit his Court and Chambers diaries to the Advocate concerned for scrutiny at least one a month and obtain his signature with date in the Chambers and Court diaries in the prescribed form.

During the period however, when the Courts where the Advocate is practising are closed for annual vacation or other recess, it shall be sufficient if the signature of the Advocates are obtained in the diaries a week before such recess and again a week after the re-opening.

10. During the period of six months, the candidate shall not absent himself for a total period exceeding 10 days (excluding vacations) except on the ground of illness, or for other reasons considered sufficient by the Advocate from whom he is receiving training.

11. The Secretary of the Bar Council shall maintain a separate register in which shall be entered the names of the candi-

dates undergoing a course of training in law, the name and address of the Advocate concerned, the date of the intimation and the date of the actual commencement of receiving training.

12. The Bar Council may, where it is satisfied that the candidate has not undergone full and proper training in compliance with the rules, may extend the period of training as it may deem fit.

13. No candidate shall be entitled to appear at an examination held by the Bar Council unless he has undergone a course of training as hereinbefore prescribed.

14. An examination shall be held twice every year by and under the supervision of the Bar Council at Calcutta or such other place or places as the Council may from time to time appoint.

15. The examination shall ordinarily be held in months of March and September in every year on such date or dates and at such hour or hours as the Council may appoint and notify: Provided that the hour or date previously appointed for holding the said examination may be altered, varied or restricted from time to time by the Council after reasonable notice in advance in such manner as the Council may deem proper.

16. The examination shall be conducted by the Bar Council or a Committee appointed by it.

17. Until otherwise prescribed, the candidate will be examined in the following three papers each carrying 100 marks. The examination shall be of such duration as may be notified.

18. The Council or Committee may from time to time prescribe Acts, text-

books and leading cases on the subjects prescribed by the Council for the examination.

19. Every candidate for the examination shall submit an application in the prescribed form so as to reach the Secretary not less than 30 days before the date notified for the examination. The Bar Council or the Committee for sufficient cause may condone the delay, if any, in submitting the application.

20. Printed copies of the application form shall be furnished to intending candidate by the Council on payment of such charges as the Council may from time to time fix in that behalf.

21. Every candidate for examination shall along with his or her application, pay or remit to the Council *a fee of Rs. 50/-* for permission to appear at the examination: Provided that in the event of a candidate being prevented by reason of illness or any other reasonable cause from appearing at the examination, the Bar Council or the Committee may, on an application in writing submitted not later than 15 days after the termination of the said examination, permit him to appear at the next ensuing examination without payment of a fresh fee.

22. If for any cause, which the Council or Committee considers reasonable, a candidate was unable to appear at the examination for which he had paid the fee and applies for refund of the fee, the Council or the Committee may, on his application submitted not later than 30 days after the termination of the examination, refund four-fifths of the said fee.

23. Every candidate shall annex with his application for permission to appear

at the examination, certificate to the following effect:

- (i) that the candidate has undergone a course of training as prescribed, such certificate to be in the prescribed form from the Advocate under whom the candidate has received training.

24. Every candidate shall, on being required by the Secretary furnish such information as may be required by the Secretary for the due consideration of the candidate's application and in cases in which the question of the eligibility of the candidate for the examination appears to the Secretary to be doubtful, the Secretary may make such further or other inquiries as may appear necessary to him. The Secretary shall report to the Council or Committee the result of such enquiries. The Council or the Committee may, before finally deciding on the eligibility of the candidate give the candidate an opportunity of being heard.

25. Failure to pass an examination will not disqualify the candidate from

appearing at a subsequent examination provided a new application is made and a fresh fee paid.

26. (i) A candidate who obtains not less than 45 per cent. of the total marks shall be declared to have passed the examination.

(ii) A candidate who has passed with 60 per cent. of the full marks in an individual paper may be exempted at his option from appearing in that paper for three years.

27. A list of successful candidates shall be pasted at the office of the Council as soon as the results are declared and thereafter published in the State Government Gazette.

28. A certificate shall be granted by Council to a candidate who has been declared successful and who duly applied for the same.

29. The Council or the Enrolment Committee may on sufficient cause by resolution exempt any or all trainees from attending the course of lectures arranged under Rule 1 of these rules.



Book-Review

Company Directors

C. R. DATTA, *Barrister-at-Law*

Published in 1967, Pp. 290, Price Rs. 20/-

Available from law book sellers

Published in June 1967, this book succinctly brings out all the legal aspects of Directorships in the companies and the functions of the Board of Directors. It is divided into eleven chapters: Board of Human Agency; Qualifications of a Director; Appointment of Directors; Remuneration of Directors; Board's powers and restrictions; Meetings; Duties of Directors; Registers; Retirement and Removal etc.; Liabilities of Directors; and Reliefs.

The relevant sections of the Act are produced and case laws have been referred to copiously. Although primarily a book on the legal aspects, the author has not lost sight of the broader social aspect of company management which is largely deter-

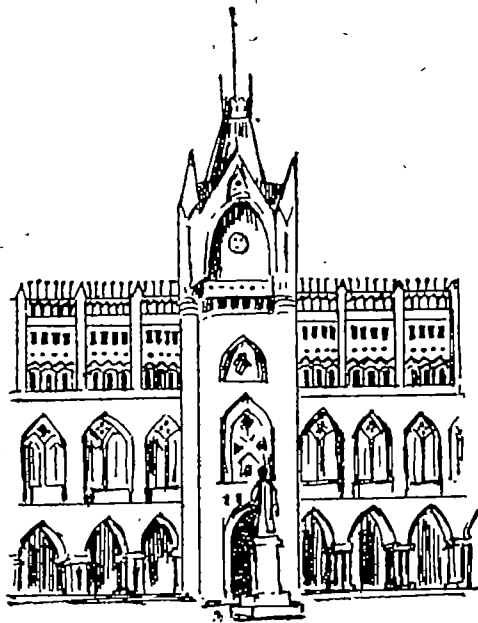
mined by the manner of functioning of the Directors. In fact, the chapter on Duties of Directors rightly starts with the social aspect of management. The Directors are to function as a plural authority through Board Meetings, and the book devotes 15 pages to deal with all the details in regard to the Meetings. The Chapter on the Liabilities of Directors should be also of great interest to all those who serve on the Boards of Companies.

This book will be useful for persons who are in the management of companies and to students of company law.

PROF. N. D. ROY

M.A., LL.B., BAR-AT-LAW

LAW REPORTS



Important Cases Dealt with by the International Court of Justice Since 1946 till date

CORFU CHANNEL CASE

This dispute, which gave rise to three judgments by the Court, arose out of the explosions of mines by which some British warships suffered damage while passing through the Corfu Channel in 1946, in a part of the Albanian waters which had been previously swept. The ships were severely damaged and members of the crew were killed. The United Kingdom accused Albania of having laid or allowed a third party to lay, the mines after mine-clearance operations had been carried out by the Allied naval authorities. Owing to the political situation at the time, the incident caused grave tension between the two states. The case was brought before the United Nations, and, in consequence of a recommendation by the Security Council, it was referred to the Court. The first of three judgments (March 25, 1948) dealt with the question of the Court's jurisdiction, which Albania had challenged.

The second and most important judgment (April 9, 1949) related to the merits of the problem. The Court found that Albania was responsible under international law for the explosions that had taken place in Albanian waters and for the damage and loss of life which had ensued. It did not accept the view that Albania had itself laid the mines. On the other hand, it held that the mines could not have been laid without the knowledge of the Albanian Government. In this con-

nection, the Court took into account certain circumstantial evidence which established the responsibility of the territorial government. Albania, for its part, had submitted a counterclaim against the United Kingdom. It accused the latter of having violated Albanian sovereignty by sending warships into Albanian territorial waters and of carrying out mine-sweeping operations in Albanian waters after the explosions. The Court did not accept the first of these complaints. It upheld the generally admitted principle that states are entitled, in time of peace, to send their warships through international straits without first obtaining the leave of the coastal state. The Court found that this was a case of innocent passage. On the other hand, the mine clearance operation of November 12 and 13, 1946, having been effected against the will of the Albanian Government, the Court found that it constituted an inadmissible intervention in the affairs of Albania. In spite of the default of the Albanian Government and its dilatory attitude, the Court held that the action of the British Navy was a violation of Albanian sovereignty.

In a third and final judgment (December 15, 1949), the Court assessed the amount of reparation due by Albania to the United Kingdom. This amount had been determined as a result of an expert enquiry and Albania was ordered to pay the United Kingdom a total sum of £844,000 for the damage caused to the

ships and as compensation for the deaths of members of the crews and for personal injuries suffered by them.

THE FISHERIES CASE

The judgment delivered by the Court in the Fisheries Case set a term to a controversy which had been pending between the United Kingdom and Norway for a very long period. In 1935, Norway enacted a decree by which it reserved certain fishing grounds situated off the northern coast of Norway for the exclusive use of its own fishermen. The question at issue was whether this decree, which laid down a particular method for drawing the base-lines from which the width of the Norwegian territorial waters had to be calculated, was valid in international law. This case, which aroused considerable interest, especially in maritime states, gave rise to prolonged and voluminous proceedings. In its judgment of December 18, 1951, the Court found that, contrary to the submissions of the United Kingdom, neither the method employed for the delimitation by the 1935 decree nor the lines themselves fixed by the said decree were contrary to international law.

CASE CONCERNING THE PROTECTION OF FRENCH NATIONALS AND PROTECTED PERSONS IN EGYPT

As a consequence of certain measures adopted by the Egyptian Government against the property and persons of various French nationals and protected persons in Egypt, France instituted proceedings in which it invoked the Montreux Convention of 1935, concerning the abrogation of the capitulations in Egypt. However, the case was not proceeded with, as the Egyptian Government desisted from the measures in question. By agreement

between the parties, the case was struck off the Court's List (Order of March 29, 1950).

THE ASYLUM CASE

The granting of asylum in the Colombian Embassy at Lima on January 3, 1949, to a Peruvian national, Haya de la Torre, a political leader accused of having instigated a military rebellion, was the subject of a dispute between Peru and Colombia which the parties agreed to submit to the Court. The Pan-American Havana Convention on Asylum (1928) laid down that, subject to certain conditions, asylum could be granted in a foreign embassy to a political offender who was a national of the territorial state. The question in dispute was whether Colombia, the state granting the asylum, was entitled unilaterally to "qualify" the offence committed by the refugee in a manner binding on the territorial state—that is, to decide whether it was a political offence or a common crime. Furthermore, the Court was asked to decide whether the territorial state was bound to afford the necessary guarantees to enable the refugee to leave the country in safety. In its judgment of November 20, 1950, the Court answered both these questions in the negative, but at the same time it specified that Peru had not proved that Haya de la Torre was a common criminal. Lastly, it found in favour of a counterclaim submitted by Peru that Haya de la Torre had been granted asylum in violation of the Havana Convention, as it considered that the asylum had been irregularly granted because Haya de la Torre had sought refuge in the Embassy some three months after the suppression of the military rebellion, which showed that the "urgency" prescribed by the Havana Convention as a condition for the regularity of asylum no longer existed.

On the very day on which the Court delivered this judgment, Colombia filed a request for an interpretation. By this request, Colombia sought to obtain from the Court a reply to the question whether the judgment implied an obligation binding the Colombian authorities to surrender the refugee, Haya de la Torre, to the Peruvian authorities. In a judgment delivered on November 27, 1950, the Court declared that the questions raised by Colombia were new questions, that they had not been presented in the preceding case, and that therefore the Court could not decide upon them by way of interpretation. The Court further pointed out that a request for interpretation could only be founded on a dispute between the parties concerning the meaning of the judgment, which dispute could not have arisen because the request for interpretation had been submitted on the same day as the delivery of the judgment. The Colombian request was therefore dismissed.

AMBATIELOS CASE

In 1919, Ambatielos, a Greek ship-owner, entered into a contract for the purchase of ships with the Government of the United Kingdom. Ambatielos claimed he had suffered damage through the failure of the United Kingdom Government to carry out the terms of the contract and as a result of certain judgments given against him by the English courts in circumstances which were alleged to be contrary to international law. The Greek Government took up the case of its national and claimed that the United Kingdom was under a duty to submit the dispute to arbitration in accordance with treaties between the United Kingdom and Greece of 1886 and 1926. The United Kingdom objected to the Court's jurisdiction. In a judgment of July 1, 1952, the Court held

that it had jurisdiction to decide whether the United Kingdom was under a duty to submit the dispute to arbitration but, on the other hand, that it had no jurisdiction to deal with the merits of the Ambatielos claim. In a further judgment of May 19, 1953, the Court decided that the dispute was one which the United Kingdom was under a duty to submit to arbitration in accordance with the treaties of 1886 and 1926.

ANGLO-IRANIAN OIL COMPANY CASE

In 1933, an agreement was concluded between the Government of Iran and the Anglo-Iranian Oil Company. In 1951, laws were passed in Iran for the nationalization of the oil industry. These laws resulted in a dispute between Iran and the Company. The United Kingdom took up the case of the latter and instituted proceedings before the Court. Iran disputed the Court's jurisdiction. In its judgment of July 22, 1952, the Court decided that it had no jurisdiction to deal with the dispute. Its jurisdiction depended on the declarations by Iran and the United Kingdom accepting the Court's compulsory jurisdiction under the optional clause of the Statute. The Court held that the declaration by Iran, which was ratified in 1932, covered only disputes based on treaties concluded by Iran after that date, whereas the claim of the United Kingdom was directly or indirectly based on treaties concluded prior to 1932. The Court also rejected the view that the agreement of 1933 was both a concessionary contract between Iran and the Company and an international treaty between Iran and the United Kingdom, since the United Kingdom was not a party to the contract. The position was not altered by the fact that the concessionary contract was negotiated

through the good offices of the Council of the League of Nations. By an order of July 5, 1951, the Court had indicated interim measures of protection, that is, provisional measures for protecting the rights alleged by either party, in proceedings already instituted, until a final judgment is given. In its judgment the Court declared that the order of July 5, 1951, had ceased to be operative and that the provisional measures therefore lapsed.

THE NOTTEBOHM CASE

In this case Liechtenstein claimed restitution and compensation from the Government of Guatemala on the ground that the latter had acted toward Mr. Nottebohm, a citizen of Liechtenstein, in a manner contrary to international law. Guatemala objected to the Court's jurisdiction but the Court overruled this objection in a judgment of November 18, 1953. In a second judgment of April 6, 1955, the Court held that Liechtenstein's claim was inadmissible on grounds relating to Mr. Nottebohm's nationality. It was the bond of nationality between a state and an individual which alone conferred upon the state the right to put forward an international claim on his behalf. Mr. Nottebohm, who was then a German national, had settled in Guatemala in 1905 and continued to reside there. In October 1939—after the beginning of the Second World War—while on a visit to Europe, he obtained Liechtenstein nationality and returned to Guatemala in 1940, where he resumed his former business activities until his removal as a result of war measures in 1943. On the international plane the grant of nationality was entitled to recognition by other states only if it represented a genuine connection between the individual and the state granting its nationality. Mr. Nottebohm's nationality, however, was not based on any real prior connection

with Liechtenstein, since he always retained his family and business connections with Germany and had been settled in Guatemala for 34 years. Moreover, the object of his naturalization was to enable him to acquire the status of a neutral national in time of war. For these reasons, Liechtenstein was not entitled to take up his case and put forward an international claim on his behalf against Guatemala.

CASE OF THE MONETARY GOLD REMOVED FROM ROME IN 1943

A certain quantity of monetary gold was removed by the Germans from Rome in 1943. It was later recovered in Germany and found to belong to Albania. The 1946 agreement on reparation from Germany provided that monetary gold found in Germany should be pooled for distribution among the countries entitled to receive a share of it. The United Kingdom claimed that the gold should be delivered to it in partial satisfaction of the Court's judgment of 1946 in the Corfu Channel case (*see No. 1 case*). Italy claimed that the gold should be delivered to it in partial satisfaction for the damage which it alleged it had suffered as a result of an Albanian law of January 13, 1945. In the Washington statement of April 25, 1951, the Governments of France, the United Kingdom and the United States, to whom the implementation of the reparations agreement had been entrusted, decided that the gold should be delivered to the United Kingdom unless, within a certain time limit, Italy or Albania applied to the Court requesting it to adjudicate on their respective rights. Albania took no action in the matter, but within the prescribed time limit Italy made an application to the Court. Later, however, Italy raised the preliminary question as to whether the Court had jurisdiction to adjudicate upon the validity of the Italian claim against

Albania. In its judgment of June 15, 1954, the Court decided that, in order to determine whether Italy was entitled to receive the gold, it was necessary to determine whether Albania had committed an international wrong against Italy and whether it was under an obligation to pay compensation to Italy. To go into the merits of such questions would be to decide a dispute between Italy and Albania which the Court had no jurisdiction to do without Albania's consent. For this reason the Court could also not decide the question of priority as between the claims of Italy and the United Kingdom, for this question could arise only if it was decided that, as between Italy and Albania, the gold should go to Italy.

ANTARCTICA CASES

On May 4, 1955, the United Kingdom instituted proceedings before the Court against Argentina and Chile concerning disputes as to the sovereignty over certain lands and islands in the Antarctic. In its applications to the Court, the United Kingdom stated that it submitted to the Court's jurisdiction for the purposes of the case, and although, as far as it was aware, Argentina and Chile had not yet accepted the Court's jurisdiction, they were legally qualified to do so. Moreover, the United Kingdom relied on Article 36, paragraph 1, of the Court's Statute, which provides that the jurisdiction of the Court comprises all cases which the parties refer to it. In a letter of July 15, 1955, the Government of Chile informed the Court that in its view the application of the Government of the United Kingdom was unfounded and that it was not open to the Court to exercise jurisdiction. In a note of August 1, 1955, the Government of Argentina informed the Court of its refusal to accept its jurisdiction to deal with the case. In these circumstances, the Court

found that neither Chile nor Argentina had accepted its jurisdiction to deal with the cases and on March 16, 1955, it made orders removing them from the List.

CASE CONCERNING RIGHT OF PASSAGE OVER INDIAN TERRITORY

This dispute, which gave rise to two judgments by the Court, arose out of the following set of facts. The Portuguese possessions in India included, at some distance inland from the port of Daman, the two enclaves of Dadra and Nagar-Aveli which, in mid-1954, passed under an autonomous local administration. Portugal claimed that it had a right of passage to those enclaves and between one enclave and the other to the extent necessary for the exercise of its sovereignty and subject to the regulation and control of India; that that right derived from agreements concluded in the eighteenth century between Portugal and the Marathas, from local customs established between Portugal and the successive sovereigns of the Indian peninsula, from general international custom in regard to enclaves and from the general principles of law recognized by civilized nations; that, in July 1954, contrary to the practice previously followed, the Indian Government had prevented Portugal from exercising the right of passage claimed by it and that that situation should be redressed. The first judgment—that of November 26, 1957—related to the jurisdiction of the Court, which was challenged by India. The Court rejected four of the preliminary objections raised by India and joined the other two to the merits. In the second judgment—that of April 12, 1960—after rejecting the two remaining preliminary objections, the Court gave its decision on the claims of Portugal, which India maintained to be unfounded. After examining the situation of Dadra and Nagar-Aveli during the

Marathia period and the practice subsequently developed in regard to those enclaves, the Court found that Portugal had in 1954 the right of passage claimed by it but that such right was limited to the passage of private persons, civil officials and goods in general and did not extend to armed forces, armed police, arms and ammunition. The Court found finally that India had not acted contrary to the obligations imposed on it by the existence of the right of passage thus found to belong to Portugal.

INTERHANDEL CASE

In 1948, the Government of the United States of America vested almost all of the shares of the General Aniline and Film Corporation (GAF), a company incorporated in the United States, on the ground that those shares, which were owned by Interhandel, a company registered in Bale, belonged in reality to the I. G. Farbenindustrie of Frankfurt, or that the GAF was in one way or another controlled by that company. In an application dated October 1, 1957, the Swiss Government asked the Court to declare that the United States Government was under an obligation to restore to Interhandel the assets of that company which had been vested or, alternatively, that the dispute on the matter between Switzerland and the United States was one that was fit for submission for judicial settlement, arbitration or conciliation. Two days later, the Swiss Government asked the Court to indicate, as an interim measure of protection, that the United States should not part with these assets so long as proceedings in this dispute were pending and, in particular, should not sell the shares of the General Aniline and Film Corporation which were claimed by the Swiss Federal Government as the property of its nationals. On October 24, 1957, the Court made an order in

which it noted that, in the light of the information furnished to the Court, it appeared that the sale of the shares in question could only be effected after the termination of judicial proceedings pending in the United States, in respect of which there was no indication of a speedy conclusion; that it was the stated intention of the United States Government not to take action at that time to fix a time schedule for the sale of the shares and that accordingly there was no need to indicate interim measures of protection. The United States raised preliminary objections to the jurisdiction of the Court and, in its judgment of March 21, 1959, the Court found that the application of the Government of the Swiss Confederation was inadmissible in regard both to the principal claim and to the alternative claim for the reason that Interhandel had not exhausted the local remedies available to it in the United States courts.

CASE CONCERNING SOVEREIGNTY OVER CERTAIN FRONTIER LAND

By a special agreement signed in March 1957 between the Netherlands and Belgium, the Court was asked to settle a dispute as to the sovereignty over two plots of land situated in an area north of the Belgian town of Turnhout where the frontier between the two countries presents certain unusual features, there being a number of enclaves formed by the Belgian commune of Baarle-Duc and the Netherlands commune of Baarle-Nassau. The Court was informed that this situation was of very ancient origin. From the documents produced by the parties it appeared that a Communal Minute drawn up by the authorities of these two communes between 1836 and 1841 (on which the Netherlands relied) attributed the two plots in question to Baarle-Nassau, whereas the Descriptive Minute of the frontier

annexed to the Boundary Convention of 1843 which was concluded after the separation of Belgium from the Netherlands (and on which Belgium relied) attributed them to Baerle-Duc, as did also the special map annexed to the Boundary Convention. The Netherlands Government maintained that the Boundary Convention recognized the existence of the *status quo* as determined by the Communal Minute, under which sovereignty over the disputed plots was recognized as vested in the Netherlands, and that the provision by which the two plots were attributed to Belgium was vitiated by a mistake as was evident from a mere comparison of the terms of the Communal Minute with those of the Descriptive Minute. The Netherlands claimed further that its sovereignty over the disputed plots had been established by the exercise of various acts of sovereignty since 1843. After considering all the evidence produced, the Court concluded that the Boundary Convention did determine to which state the various plots in each commune belonged and that no case of mistake had been made out and, finally, that the acts relied upon by the Netherlands as establishing its sovereignty were largely of a routine and administrative character and were insufficient to displace Belgian sovereignty established by the Boundary Convention. In its judgment delivered on June 20, 1959, the Court accordingly found that sovereignty over the two disputed plots belonged to Belgium.

CASE CONCERNING THE TEMPLE OF PREAH VIHEAR

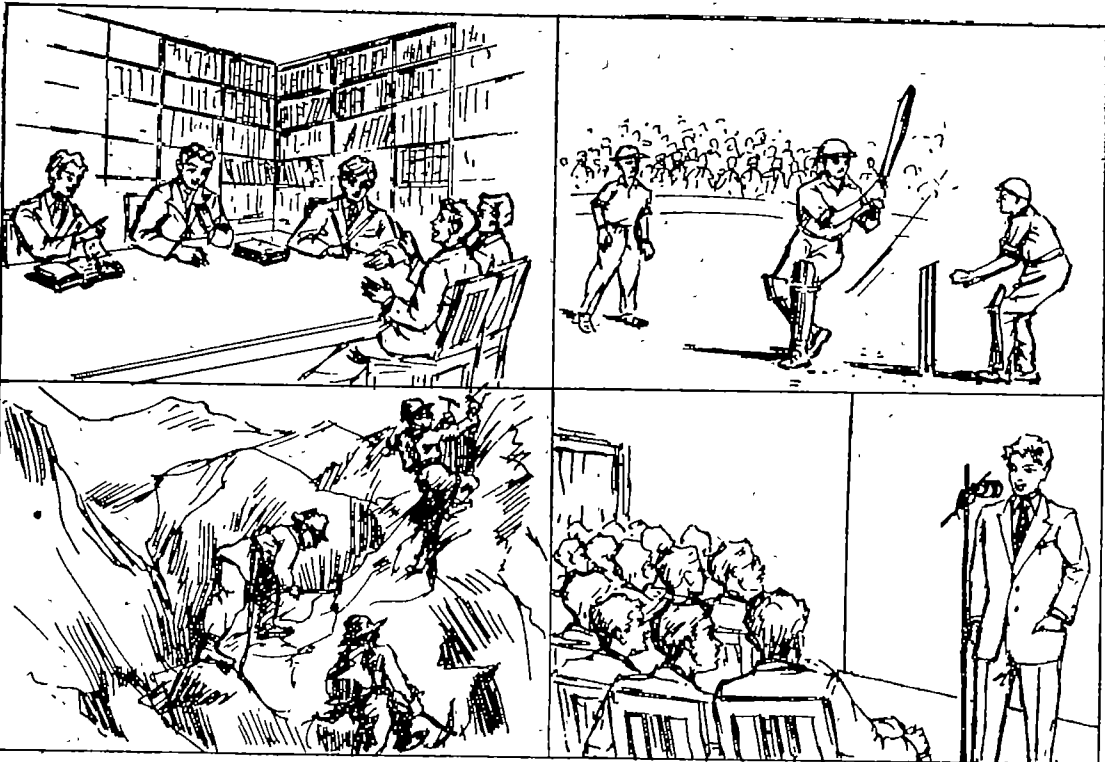
In an application instituting proceedings against Thailand filed on October 6, 1959, Cambodia complained that since 1949 Thailand had persisted in the occupation of a portion of Cambodian territory where there are the ruins of a holy monastery, the Temple of Preah Vihear, a sacred

place of pilgrimage and worship for the people of Cambodia. Cambodia asked the Court to declare that territorial sovereignty over the Temple belonged to the Kingdom of Cambodia and that Thailand was under an obligation to withdraw the detachments of armed forces it had stationed since 1954 in the ruins of the Temple. On May 23, 1960, the Government of Thailand filed preliminary objections to the jurisdiction of the Court and the proceedings on the merits were suspended. On May 26, 1961, the Court delivered a judgment in which it rejected the two preliminary objections raised by Thailand, and upheld its jurisdiction. The Court has not yet rendered its judgment on the merits.

CASE CONCERNING THE NORTHERN CAMEROONS

On May 30, 1961, Cameroun instituted proceedings against the United Kingdom in a case concerning the Northern Cameroons. In its application Cameroun requested the Court to find that the United Kingdom had failed to respect certain obligations arising out of the Trusteeship Agreement for the Territory of the Cameroons under British administration. It complained that the United Kingdom had incorrectly administered the Northern Cameroons as an integral part of Nigeria. It also complained that the provisions of General Assembly resolution 1473 (XIV) of December 12, 1959, relating to the separation of the administration of the Northern Cameroons from Nigeria had not been followed, and that the conduct of the local biscite by which the Northern Cameroons voted in favour of joining an independent Nigeria had been such as to alter the normal course of consultation and to involve consequences in conflict with the Trusteeship Agreement. The Court has not yet rendered its judgment in this case.

Our Corner



General Secretary's Report

The General Secretary of a Students' Union is in an unenviable position as it is he on whom vests the responsibility to keep up the prestige of the College and to maintain the traditions of the Union in all spheres of its activities. He is the mouth-piece of his fellow-students and his voice rings louder if he can recount the activities of the session with a proud but modest heart.

I have been extremely fortunate in having the most able President and Vice-Presidents in the Union as my superiors who inspired us in all our creative activities and steered us effectively in the most trying situations in recent memory. The first half of the session was particularly turbulent during the General Secretaryship of my able predecessor Sri Amal Kumar De when the University was declared closed sine die for the first time in its history, thus affecting the functioning of our College as well. It is only through negotiations with various student bodies and the University authorities, was he successful to keep the College open and the classes going without losing a single day of study and without a single voice raised in anger. We, being students, were all very sympathetic to the causes where students' interests were involved but hated to be extremist or to adopt an adamant attitude.

Another event which occurred in the first half of the session and which ultimately yielded beneficial results for all law students and graduate trainees is our protests, demonstrations and representations against those provisions in Advocates Act

relating to training and examination under the Bar Council. A combined meeting of all the Law Students and Graduate trainees of West Bengal was held in the University lawn and a protest demonstration was taken out. We also observed a 24-hours' stay-in strike in the University Campus to place our demand before the authorities effectively who ultimately appreciated our viewpoint and reduced the period of training from one year after graduation to only six months and dispensed altogether with the viva voce examination. We still maintain that further examination under the Bar Council six months after graduation is quite redundant as the law profession itself is a highly competitive one where the law of 'Survival of the fittest' apply to the very letter. An early entry into bar only helps a law graduate chalk out his professional career earlier. It is sincerely hoped the Union Law Ministry will decide something about the matter in tune with the students' demands in the near future.

In compliance with conventions we accorded a hearty welcome to freshers on November 30, 1966 at Mahajati Sadan but this was at a time when the atmosphere in the educational field was tense. It was an extremely enjoyable one with music and instruments and staging of a highly informative play 'Angar' based on Coal-miners' life. Hon'ble Sri D. N. Sinha, Chief Justice, Calcutta High Court graced this occasion as Guest-in-Chief. Since some new July first-year classes were started after November 30, we held a supplementary Freshers' Social in March for the benefit of those who could not attend the

earlier function. This function in which Hon'ble Mr. Justice P. N. Mookherjee was the Guest-in-Chief, was an equally entertaining musical evening.

This year coincided with the Platinum Jubilee year of the Calcutta University Institute. In the Inter-Collegiate competitions held on this occasion, our College gathered more laurels than any other college which participated. We lifted for the first time in the history of this College the Drama Championship Trophy standing first in Bengali (Male), Bengali (Female) and Hindi (Female) sections and second in English (Male). Our Sri Swapan Gupta stood first in Rabindra Sangeet amongst all participants, male and female. Sm. Dipali Sinha, our pioneer lady mountaineer friend, surprised us by standing first in flute-playing; we also took the first prizes in Sitar, Chess, Weight-lifting and score of certificates and other prizes were awarded to us in the various cultural events. Special mention must be made of Sm. Manjari Aich Bhowmick who got a special Debating prize.

A succession of events such as closure of University, movement on Advocates Act, Fourth General Election and repeated deferment of the January Law examination till May jeopardised our normal schedule and the date for All India Asutosh Memorial Trophy Debate competition went on being postponed. Ultimately a date viz. 24 June, 1967 was fixed. But at that time we got extremely poor response from outside and the competition was shelved this year due to such unavoidable circumstances. But our Debating score-board scintillates with the brilliant performance of our speakers Sri Vijay Lall and Sri Sujoy Chakravarti who lifted the All-India Trophy at Allahabad.

Our Re-union was held with the usual pomp and splendour but with the pleasant variation that it was held in the University lawn for the first time with the august presence of Hon'ble Justice S. A. Masud as the Guest-in-Chief and Hon'ble Justice A. N. Bagchi as the special speaker. Here was a Re-union function in its true spirit within the College environments and so high was the fervour and enthusiasm that it was well past midnight when the function ended. It was an evening to remember for many years to come.

The Legal and Cultural conference was held with the topic on 'Rule of Law' for discussion by eminent speakers. The meeting was presided over by our Dean, Hon'ble Mr. Justice P. B. Mukharji.

The concluding social gathering of our Union was the Annual Social at Mahajati Sadan in which Hon'ble Mr. Justice B. C. Mitra was the Guest-in-chief. It was an extremely successful function judged by the performance of the artistes and gathering of our fellow-students.

We formed a Social Welfare Sub-Committee for providing First-aid training to students and to assist in anti-illiteracy drive. Though much headway could not be made due to disturbances, I sincerely hope that the next Union Working Committee will take up such noble cause with an equal zest.

No report is complete without a mention of the all-out co-operation and help we got from our Hostel-friends—the Hardingers. The Saraswati Puja, gymnastics and other functions organised by them added colour and glamour to the many-sided activities of our college students. I, for one, prefer to call the Hardingers as

'harbingers' of a new hope, of a new era of all-enveloping fraternity and indomitable spirit.

Dr. B. N. Mukherji, the Offg. Principal of our College presided over all the functions. He is not only our revered teacher but our 'friend, philosopher and guide' as well.

My duties will be incomplete if I do not mention my gratitude to our Vice-Chancellor Dr. B. Malik, our Offg. Principal Dr. B. N. Mukerji, our President Prof. A. K. Ghosh, our Vice-presidents Prof. N. D. Roy, Prof. A. K. Mitra and Prof. P. P. Modak and lastly to our untiring

ever-loving Superintendent, Sri M. P. Basu. We are grateful to our other professors for their guidance, to the members of Office and Library Staff of the college and particularly to Sri Bijan Bihari Chakraborty, our Union Office Assistant, for their all-out help and assistance.

In conclusion, I offer my heartiest thanks to all the members of the Working Committee and all members of the Union for their active and unstinted co-operation.

SAMAR ROY CHOWDHURY
General Secretary

'Citious, Altius, Fortius'

ATHLETIC SECRETARIES' REPORT

To ride on convention the out-going Jt. Secretaries are required to submit a report of our Club's activities before the general students through the Law Journal. Before that let us thank all those who have given us the proud privilege to serve the Athletic Club for long one session.

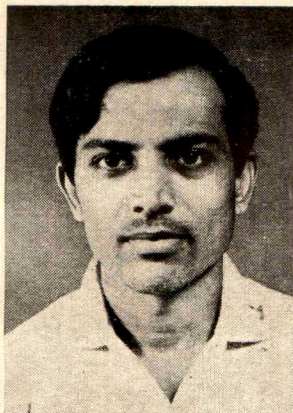
The Athletic season started fairly well with football under the able captaincy of Sri P. Debnath. But for luck we could secure only the runners-up position in our group in the League. In the knock-out tournament we lost in the quarter-final being handicapped by a few injuries sustained by a number of reliable players in the previous match between Charuchandra Collegè whom we beat by 2-1 goals and thus took revenge of our team's failure in previous semifinals. We are proud of

Sri S. Ghosh Choudhuri and Sri N. Bagchi who assisted the C.U. F. team to retain the Inter-Varsity Football Championship.

The College Table Tennis team has participated in three different tournaments this year. Much credit goes to Sri A. Birray whose enthusiasm helped much in each of these games. It is worth mentioning here that on every occasion our team lost in the Semi-final round to the Vidyasagar Evening College, who lifted the trophies. In the Chess Tournament organised on the occasion of the Platinum Jubilee celebration of the University Institute, our Sri D. R. Naskar won the championship trophy.

Our next course of action was confined to the Indoor Games Competition of the College. Much enthusiasm and

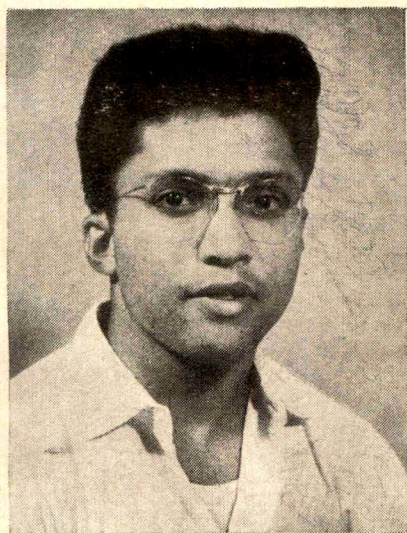
OUR SPORTS PRIDE



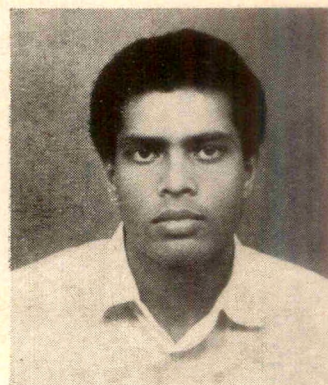
SASHIKANT DOSHI
University Blue (Cricket)



NIRMAL BAGCHI
University Blue (Football)



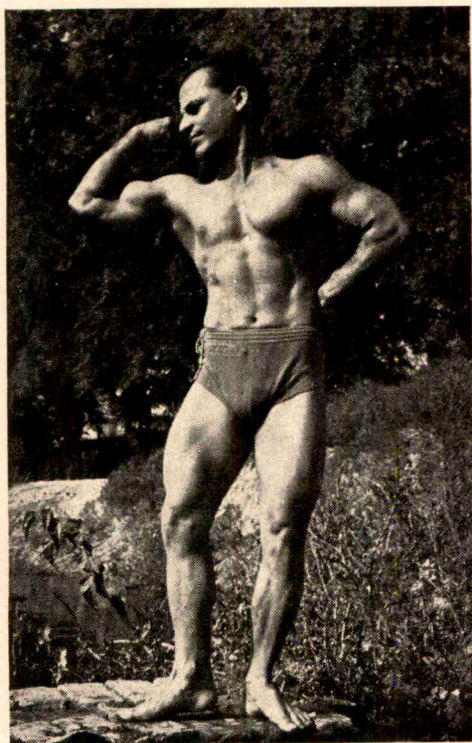
DEB MUKHERJEE
A Prolific Scorer
Captain, C.U. Cricket Team



SUDHIR PAL
Ace Athlete

FUTURE MR. UNIVERSE (!)

FROM OUR GYMNASIUM



AMALENDU BHADURI

Bangabir—1964 Gr. II (2nd)
Mr. Hercules—1965 Gr. I (1st)
Mr. Samson—1964-65 & 1965-66

TAPAN MANDAL
Mr. Burdwan, 1963
Mr. India No. 3 (Gr. A), 1966
Sree Ma Sree Best Physique, 1967
Mr. Junior India, 1967
Mr. Law College, 1966-67
Mr. Himalay, 1967



interest was felt amongst a large number of fellow students. We are proud to say that for the first time we could arrange the Badminton singles tournament for the lady students. In the Men's Table Tennis, Sri T. Wangchuk became the Champion while Sri P. Ghatak became the Runners-up. Sri Satyabrata Chatterjee won the Badminton title and Sri Raghunath Das became the Runners-up. On the day of finals we were able to organise exhibition matches between members of state-ranking table-tennis players, both in men's and women's events.

The colourful evening of the Annual Sports Meet of this year will be always remembered. Never had anyone witnessed such a record gathering of students, guests and friends. The splendour of the Meet was enhanced by kind patronage of Mr. P. K. Sen, Commissioner of Police, who so kindly provided us with the Calcutta Police Band for the occasion. Dr. B. N. Mukerjee, Principal (Offg.) presided over and Mr. Justice A. C. Sen was present as the Chief Guest and gave away the prizes. Sri Sudhir Paul and Srimati Parul Debnath became the individual champions in Men's and Women's events respectively. Congratulations to Sri Paul who shattered the Inter-Varsity 110 m. hurdles record and was selected for the World Universiad in Tokyo but unfortunately he was finally dropped.

The Cricket team which consisted a number of reputed players showed much promise in the Inter-Collegiate Cricket Tournament. But for a few accidental injuries and unfavourable playing conditions, we might not have conceded the final match to St. Xavier's College by only 5 runs. One can easily remember how exciting and nerve-wrecking moments were tickling us at the finish. We are proud of

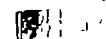
the performances of Sri Sivaji Roy, Captain, Sri R. Jeejeebhoy, Sri Deb Mukherjee, the last two having represented the Bengal team in the Ranji Trophy. Mention should also be made of Sri Sashikant Doshi, who gave a splendid performance in the Inter-Varsity Cricket Championship.

The brilliance of our club had been still increased by Sri B. K. Roy and Sri Bobby Mehra giving their best in the Inter Collegiate Tennis Final. Our victory in this match made a history for the college as well as in the College Tennis when St. Xavier's College lost the coveted Winter Challenge Trophy for the first time since its inception.

We also participated in the Badminton and Volleyball Tournaments organised by the University Sports Board. We lost in the Semi-final to B. E. College, the holders of the Badminton Tournament.

Our Basketball team played confidently throughout the Inter-collegiate tournament with a couple of experienced and reputed players but just failed to beat the holders. Charuchandra College in the Final. The game brought much excitement till the final whistle. Our thanks to P. Bhowmik, R. Sonthalia and Captain K. P. Chungwaiwal who gave splendid performances all along.

After the lapse of a few years our Rowing team under the Captaincy of Sri S. Gupta had the honour to reach the final of both League and Knock-out Regatta. Unfortunately we lost to Asutosh College in both the races and had to be contented with the Runners-up trophies. We congratulate Sri Bobby Mehra, Sri V. K. Sood, Sri S. Sen, Sri A. Mitter.



Performances of the Law College Hockey team had been brilliant this year.

We won the group championship in the League. We lost in the Semi Final round in the Knock-out Tournament from an accidental goal. In the other Semi Final match in the League Tournament marked by rough play and malicious efforts we suffered a good number of casualties from start and lost to Ashutosh College by a solitary goal. Although the match was most crucial from the point of view of winning the coveted Statesman Trophy, our players had shown exemplary discipline and sportsmanship in and outside the ground. Our thanks are due to Shri S. Palit, Shri D. Chatterjee, Shri R. Jeejeebhoy for their outstanding display. Thus, our hope to win the Statesman Trophy dashed to the ground for two consecutive years though placed in more favourable position this year by winning maximum number of Trophies in the history of the Athletic Club.

Ere we finish, we thank our beloved Principal (Offg.) Dr. B. N. Mukherjee for his ceaseless efforts to foster a spirit of sports and games amongst the students of our College. We would leave our duties incomplete if we fail to admit our indebt-

ness to our very popular President of the Club, Prof. S. K. Mitra & College Superintendent, Shri Mrityunjoy Basu, and to Shri Debangsu Mitra for their hearty encouragement, valuable advice and active cooperation.

We must follow the time-honoured convention and record our hearty thanks to our predecessors. The unreserved cooperation of members of the executive committee with us in the discharge of our responsibilities deserve a special word of praise. We must mention here that it would not have been possible for us to undertake the task if we had not received the active cooperation of students in general, players, and the help and guidance from our revered Professors.

Before we conclude, we urge the students and wellwishers of the Athletic Club in particular, to maintain its glorious tradition by not making room for political mischief-mongers to encroach on its affairs. Adieu!

PANKAJ MAJUMDAR
SUPRIYO BASU
Joint Secretaries

Report from Hardinge Hostel

So here we are back again with our annual report from the Hardinge Hostel, and it is with no little sense of achievement and pride that we are able to review the past months. As usual, we have bagged quite a number of trophies and distinctions in nearly every sphere of extra-curricular and Union activities. Is it not

pleasant to bid farewell to those of us who are leaving after endowing the Hostel with such series of honours as a farewell present to remember us by? Many races have been, and will be won in course of years, but we are proud to announce that the high tradition of the Hostel in the departments of sports and Union activities

has been energetically kept up in this year as well. Let us first turn our attention to Sports activities. Aparajit Paul Choudhury, 1966 Individual Champion in the P. G. Athletics Meet achieved the same feat this year also (Well done, Aparajit!) Our Amalendu Bhadhuri, the muscle-man of Hostel, won the 1966 Mr. Hercules Group I Title.

So much for the out door activities. In the indoor Tournaments Biswajit Saha and partner won the Law College Table Tennis Doubles Championship. Prasanta Ghatak was Runners up in the T. T. Singles (Better luck next time, Prasanta!) Another proud achievement was that of Subrata Ganguli and partner who annexed the Badminton Doubles Championship.

In the Union activities we proudly announce that Asoke Banerji was elected Assistant General Secretary (now retired) of the Union and Bishan Gupta and Abhijit Bhatta were elected Joint Magazine Secretaries, while Bishan Gupta was also elected Debate Secretary. Again Pankaj Mazumdar was elected Joint Athletic Secretary. Mention must be made of Amalendu Bhadhuri and Prasanta Ghatak, who have been elected Joint Gymnasium Secretaries for the year 1967.

We can hardly express the exuberance of our pride in Swapan Gupta, that Golden-voiced singer from our hostel, who deservedly won the first prize in Rabindra Sangit at the Calcutta University Institute Platinum Jubilee Competition. What's more, Swapan Gupta is now a Radio Artiste, having recently tranced listeners over the A.I.R. with his marvellous singing.

After all this, we have to come back to the dark side of the picture. The present food situation has necessarily had some re-

percussions on Hostel meals, but with adequate co-operation from all we are sure to tide over the crisis. Among other difficulties in this Hostel, it is worth mentioning that such a renowned Hostel, as is ours, has a guest-room which presents a rather poor picture. We are shocked into the recognition of a grim reality that the Hostel authorities for reasons best known to them, are either indifferent or think it unnecessary to improve the wretched condition of the guest-room. We fervently appeal to our authorities for its enlargement with minimum amenities to have it well-furnished. What's all the more deplorable and perhaps heart-breaking, is the most dirty and unhygienic spectacle of our dining hall. Chairs and tables are in a state of disrepair and the meal plates and glasses expose our poverty. The scarcity of even these broken chairs and dirty plates makes a good number of Boarders stand in waiting for long periods. It is our heart-rending appeal to the authorities that they be more careful about the improvement of these conditions which are so seriously concerned with the health of the young Boarders.

In conclusion we gratefully express our heartfelt thanks to our Offg. Principal Dr. B. N. Mukherjee, Prof. Sadhan Roychoudhury, the Superintendent of the Hostel and Sri Mrintunjoy Prasad Basu Deputy Superintendent for all the help, co-operation and guidance they have given to us. JAIHIND.

ARUN DOBE
(Chairman, Ward V)

KALYANI PRASAD SINGH CHOUDHURY
(Chairman, Ward IV)

SOURMEN GHOSH
(Chairman, Ward III)

Speaking from the Gymnasium

It is a matter of great pleasure to present the annual report of our College Gymnasium before you, which has made considerable progress in its own sphere during the year under review.

Our Gym with its wonderfully serene atmosphere and most modern equipment really seems to be an earthly paradise lending enchantments to the view and thus encouraging everyone to enjoy health.

We are very glad to announce that this year our Gym is going to be enriched by the installation of an 'Olympic barbell set' and two anatomical dummies (human body).

Thy Gym is proud to have Sri Monotosh Roy (Mr. Universe) as its physical instructor.

The name which we do mention with pride is the name of Sri Tapan Kumar Mandal, who has become the 'Junior Mr. India' and who also got the title of Sri Ma Sri 'Best physique' organised by Mother's Cadet Corps.

We are indebted to our beloved principal, Dr. B. N. Mukherjee and other respected teachers for their keen interest for the Gym.

We do acknowledge our indebtedness to our President Prof. S. K. Mitra, our College Superintendent Sri Mrityunjoy Basu and to Sri Debangsu Mitra whose active and valuable assistance helped us a lot.

Lastly, we should say that the efficacy of body building should be universally advocated for all, irrespective of age and sex and specially, for youth and students it is invaluable.

Before we stop our pen, we would like to invite our student friends to take active interest in the Gymnasium.

Long live our Alma mater.

PRASANTA GHATAK

AMALENDU BHADURI

Joint Secretaries, C. U. Law Gymnasium

1966-67

Report from the Social & Drama Secretaries

No social and drama secretaries have been as proud as we are in submitting a report of the activities of this department during the session 1966-67 which has just concluded.

To begin with, our achievement in the Inter-Collegiate Competitions held under the auspices of Calcutta University Institute during their Platinum Jubilee celebrations, has been spectacular and unique,

surpassing all previous records of our College in such competitions. We, for the first time in the history of our College, won the coveted Drama Championship trophy by standing,

First in Bengali (Male) Section
First in Bengali (Female) Section
First in Hindi (Female) Section
Second in English (Male) Section

We profusely thank all the participants in dramas, but for whose sincerity and devotion, such a record could not have been achieved.

But our record-breaking feat did not end here. We carried away the laurels in

other cultural departments as well and we congratulate our friends, Sri Swapan Gupta, the golden-voiced singer who stood first in Rabindra Sangeet in combined male and female sections, Sm. Dipali Sinha, the pioneer lady mountaineer who surprised us by standing first in Flute-playing and Sri Sudhin Mukherjee, who stood first in Sitar-playing. This short space does not permit us to mention scores of other names of our friends who obtained certificates of merit in various fields.

The customary social functions of the Union have been equally successful. On November 30, 1966 we held the Annual Freshers' Social for 1966 at Mahajati Sadan in which Hon'ble Sri D. N. Sinha, Chief Justice, Calcutta High Court graced the occasion as Guest-in-Chief. For the first time, our Union staged a dance-drama

'Angar' based on coal-miners' life. The dance-drama was illuminating as well as entertaining. A supplementary Freshers' social was held at C.U. Institute in which Hon'ble Mr. Justice P. N. Mookherjee was Guest-in-Chief. It was an extremely entertaining musical evening.

In the Annual Social, which is incidentally our concluding function in the Union, Hon'ble Mr. Justice B. C. Mitra was the Guest-in-Chief and many renowned singers as well as our College friends made the function a resounding success and an unforgettable memory on many scores.

Our respected Principal (Offg.) Dr. B. N. Mukherjee presided over all the functions and we are extremely grateful to him for his kind guidance. We must also express our heartfelt thanks to the President and Vice-presidents of our Union and to our respected professors including our beloved Superintendent Sri M. P. Basu, and last but not the least to our untiring General Secretary in the first half session Sri Amal De. We will be failing in our duties if we do not thank all participants in competitions and other cultural activities, be they winners of prizes or not, who magnificently shouldered the responsibility of maintaining the glorious traditions of our College.

SIV KUMAR CHOUDHARY,
SALIL KUMAR BISWAS,
BANGSHI BADAN SAHA,
Jl. Secretaries, Drama & Social

Report of the Jt. Secretaries, Debate

Gone is the old year and the new one will commence with new hopes and aspirations. At the outset we welcome the jolly freshers and bid adieu to our old friends and colleagues and express our heartfelt gratitude to them for the kind and hearty co-operation which they extended to us.

In this postmortem write-up about our activities in the last session we should mention that the major portion of the last session was engulfed in a chain of serious disturbances—firstly, because of the chaos and confusion within Calcutta University due to the Presidency College episode; secondly, due to the movement which was launched by our Students' Union against the Advocates Act of 1961; thirdly, the General Election which was held in the end of February and lastly our January examinations which went on being postponed till early May. So it is needless to say that, these were the incidents which badly affected the students' union in performing its duties.

Anyhow, in the midst of all these chaos and confusion we organised our Inter-class Debate competition and many of the students participated in it. We sent our representatives in the debate competitions organised by the various institutions of Calcutta. But the most glorious achievement of this Forum was our victory at Allahabad where two of our representatives, Vijay Lall and Sujoy Chakravorty, lifted the championship Trophy of this All India Debate Competition, and thus hoisted the flag of our college to a much

higher altitude. We are really proud of them. Mention must also be made of Saibal Purakayastha who stood second and Manjari Aich Bhowmick who got a special Debating Prize in the Platinum Jubilee Inter-Collegiate Competitions held under the auspices of Calcutta University Institute.

But still, the saddest incident of this department is that we were unable to organise the Annual All India Asutosh Memorial Debate Competition. Really we are too unfortunate in being forced to postpone the tentative dates for holding this competition under the trying circumstances as stated earlier. But this does not mean that we made no attempt to organise it. After the end of the disturbances we sent our invitation cards to almost all the recognised Universities all over India in the month of May, 1967, and fixed up the date of debate on 24th June. But there were only very few replies. Again we sent them reminders but the result was the same. Reluctantly we had to abandon it.

But it is an earnest appeal to our successors that they organise this Debate competition with great success in future. We will also place a request to them to organise Bengali and Hindi Debate competitions on all-India Basis.

Lastly, we convey our hearty thanks to you all again and that's all.

BISHAN KUMAR GUPTA,
TRIPTIMOY AICH,
Jt. Secretaries, Debate

Report from the Joint Secretaries, Cultural and Legal Conference

Every year Union secretaries publish reports and they find their places in our Magazine. We hold one Secretariat and here we have our report. It is the Cultural and Legal Conference.

This year we, for the first time in the recent memory, held Inter-Class Moot Court Competition on April 22, 1967 under the auspices of our Secretariat. It would not have been successful but for the inspiring guidance of Prof. K. P. Basu, in particular, amongst others.

On 26th June, 1967 our Annual Legal Conference was held. This year's subject was "Rule of Law". This was a wide subject and different speakers touched on different aspects. Hon'ble Mr. Justice P. B. Mukharjee, our Dean, presided over the Conference. He made a beautiful summary of the speeches made by different speakers. We had a small but distinguished gathering. Among the speakers were Mr. Ranjit Banerjee, who spoke on Rule of

Law in Ancient India, Messrs Sadhan Gupta and Naranarayan Gupta spoke on International Law. Mr. Aroon Prakash Chatterjee spoke on the Constitution of India.

Our Principal, Dr. B. N. Mukherjee gave a vote of thanks. He has made us indebted in various ways by his advice and suggestions. We express our respect for Prof. Ajoy Ghosh, our President and Prof. Amallesh Mitra, Prof. N. D. Roy and Prof. P. P. Modak, our Vice-Presidents for their help and valuable advice.

Before we stop, our thanks are due to Dr. B. N. Mukherjee, our Principal (offg.) and Mr. M. P. Basu, Superintendent, and the student members of the Union but for whose help and co-operation our endeavour would have been a fiasco.

SANKAR K. DEB,
SUDHIN BANERJEE,
Joint Secretaries,
Cultural and Legal Conference.

Secretaries, Students' Aid fund, Speak

The name of our department viz. Aid Fund is partly a misnomer in so far as the secretaries have to perform more functions than to merely distribute Aid to needy students out of an allocated fund kept for this purpose.

The session usually starts with hectic activities of printing and distributing Question Paper booklets to make these available to the students before they appear at the ensuing law examination. A due part containing questions set in this exami-

nation is also published to help those sitting for the subsequent examination. We could perform these duties methodically and in time only because we were fortunate enough to receive the inspiring guidance from Sri Amal Kumar De, the General Secretary of the Union in the first half of the session, and unreserved co-operation from our Sub-committee members and the general students whom we serve.

A good many books were added to the Aid Fund library through the donation of books received from several student friends in response to our appeal based on the slogan 'help us to help you', since we had to work within the ambit of a limited fund which we think is not enough to give us scope for buying sufficient number of books. We thank our donor friends and request others to emulate their example in future.

The next phase of our work was to distribute financial aid to poor and needy students. This year our immediate func-

tion on assuming duty was to disburse last year's fund which was not used up in time. As regards this year's fund, we sanctioned and approved the aid to almost all deserving candidates who applied for it and gave the list to our President to arrange for distribution of aid before the July examination as per convention. Due to past disturbances this July examination has been deferred and there is no indication when it is going to be held.

Before we conclude, we must thank our Principal (offg.) Dr. B. N. Mukherjee, our Superintendent Sri M. P. Basu, our President and Vice-Presidents, and other professors who helped us immensely with their valuable suggestions and must also record our deep appreciation of the services rendered by members of Aid Fund Library staff and of the co-operation received from our Union colleagues and all student friends.

PARTHA PRATIM MUKHERJEE

SANKAR K. DEB

Jt. Secretaries, Students' Aid Fund

Report of the Re-Union Secretaries

The word 'Re-union' means much more than the seven letters it is composed of or the plain dictionary definition of the word as a whole. The area of activities of the Re-union secretaries is not confined within the boundaries of the College campus and to do justice to this portfolio the secretaries must establish contact with all enthusiastic past students of this College. Here we have come in as a vital link

between the past and present and our activities only will prove whether we have discharged ourselves creditably or not.

We roused a great enthusiasm among the past students by contacting them through the Ex-students association formed year before last. We tried to impress on our senior brothers that such an Association, if well-organised, would not only serve the

purpose of get-together once a year but also be a platform for ventilating views on all major issues of the day. To start with an Alumni Annual with the names of members may be published. We from our side pledged our whole-hearted co-operation in this move.

This year we have made a pleasant variation from the past practice by holding the Re-union function within the College campus and thus have set a precedence which, we believe, will be followed in later years. Hon'ble Mr. Justice S. A. and kindly graced the occasion as the Guest-in-Chief who enthralled us with a most but informative discourse. Hon'ble Justice A. N. Bagchi was special guest on our request and audience appreciated his illuminating but interesting speeches. The musical and other entertainment programmes which followed

was of high quality by any standard and the enthusiasm of those present can only be gauged by the huge gathering which stayed to enjoy the function upto well past midnight when it ended. It was an evening to remember for many years to come.

We must place on record our appreciation of the valuable suggestions and guidance received from the College authorities, our President and Vice-Presidents and our revered professors for which we thank them. Thanks are also due to the ex-students for their sympathy and encouragement and to all members of the Union for their co-operation and assistance, without which our efforts would not have been a success.

ALOK SENGUPTA
BANGSHI BADAN SAHA
Jt. Secretaries, Re-Union

Report from the Editor's Desk

Though Law Journal completes its 35th year with the publication of this issue, by no means it is past its prime. Rather with each year it glows with more vitality which is sought to be infused in its readers. The present issue is composed of articles which deals with burning problems of the day and in that sense it is keeping pace with, if not running ahead of, the present times.

But the Editor shouldering the responsibility of bringing out the Journal in time has always lost his battle with the clock in the past few years and this year too he, inspite of his best efforts, could not break this unholy convention. The time of pub-

lication of the Journal is normally at the end of the session as it should include all the reports of Union activities in the current session. So the Editor has to run the race with a handicap which becomes too heavy for him to cope with, if the initial spadework is not done due to diverse reasons. The present session has passed through a chain of disturbances successively, starting with the closure of University sine die for the first time in its history, our movement on the issue of Advocates Act which ultimately yielded beneficial results with the reduction of the period of training to six months under State Bar Council and dispensing with the

viva-voce examination, the Fourth General Election with the resultant mass upheaval rarely witnessed in recent times and lastly the continued deferment of the January examination till early May. The back-thrust of such disturbances has resulted not only in delayed publication of this Journal but also in delay in all academic matters including holding of University examinations. All normal schedules have been upset and we have nothing to do but to put the clock back and bear the loss on ourselves.

The redeeming feature of this issue of Law Journal against the back-drop of a morose and despondent atmosphere is the enthusiasm we have been able to rouse amongst our student friends in contributing articles to this Journal. The response to our appeal was extremely encouraging and as you will see on going through the pages, the number of student contributors is more than that of outsiders. In fact, we could have published the Journal with the contributions from students alone! This surely reflects on the helpful attitude of our student friends and this issue surpasses all previous records in the degree of participation by students in contributing articles.

The selection of the articles by us has also been a difficult task as most of them were of a high standard and dealing with the major problems of the day and we chose the best amongst them. The topics dealt with in some articles are the Constitutional problems, Industrial problems, Food problems and even Population problems and their legal implications and remedies. The other articles deal with Hindu Law, Criminal Law and even

Socialist Laws with which we are not so intimate. The Law Report contains a number of cases dealt with by International Court of Justice and these will no doubt be useful to the students in general.

Respectfully we mention here the names of our revered Principal (offg.) Dr. B. N. Mukherjee, our President Prof. K. Ghosh, our Editor-in-Chief Prof. A. K. Mitra, our other Vice-presidents Prof. N. D. Roy and Prof. P. P. Modak and our ever-loving Superintendent Sri M. P. Basu without whose constant inspiration, valuable advice and proper guidance it would not have been easy for us to bring out this issue.

For designing the cover, we convey sincere thanks to to Sm. Supti Roy Choudhury, a student of Government College and a relation of our Principal A. K. Mitra.

We express our sincere thanks to those who have extended their co-operation. We gratefully mention the names of Mr. Sa-
prasad Roy, Santanu Basu, Ranajit Mukherjee, Monotosh Pyne, Tushar Dhar and Subhas Chatterjee.

But this report will not be complete if we do not mention the name of Sri Anil Kumar De, our General Secretary in the first half of the session, but for whose untiring efforts, constant inspiration and ardent zeal, the publication of this Journal would have proved futile.

Thank you all.

BISHAN KUMAR GUPTA
Jt. Editor, Magazine

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UNIVERSITY COLLEGE OF LAW UNION, CALCUTTA
PRIZE WINNERS IN INTER-COLLEGE COMPETITIONS (1966-67)



From Left to Right—

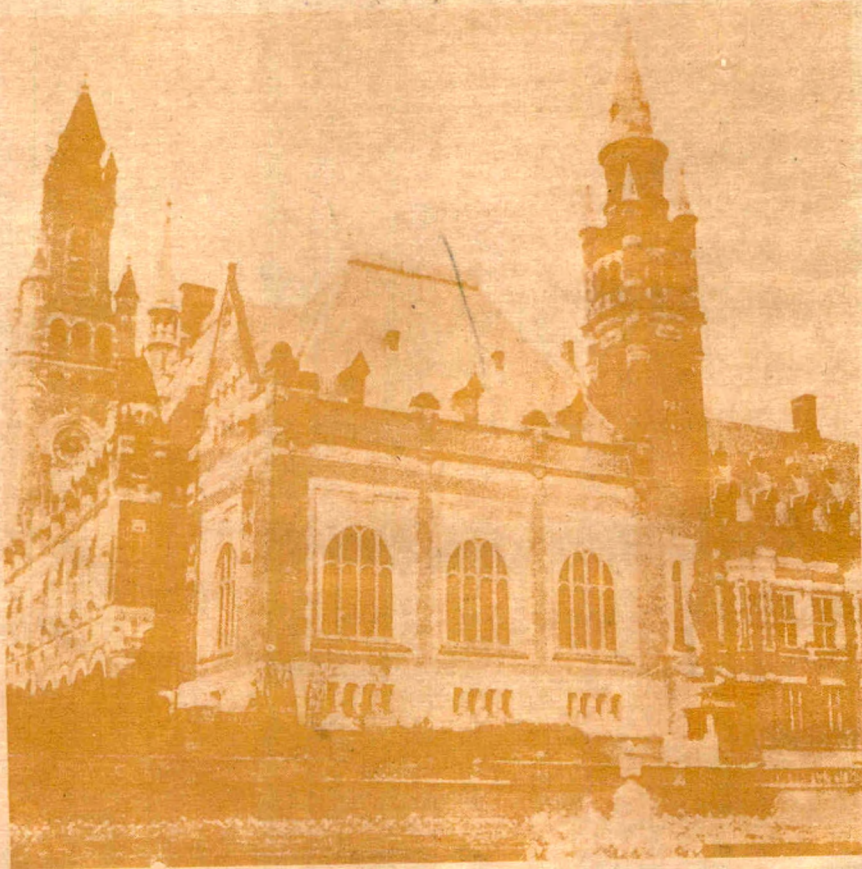
Sitting: A. K. De (Gen. Secy., Retd.), Sri M. P. Basu (Superintendent), Prof. A. K. Mitra (Vice-President), Prof. A. K. Ghosh (President), Dr. B. Malik (Vice-Chancellor), Dr. B. N. Mukherjee (Offg. Principal), Prof. N. D. Roy (Vice-President, Treasurer), Prof. P. P. Modak (Vice-President), B. Saha (Jt. Secy., Social and Drama), S. Roy Chowdhury (Gen. Secy.)

Standing 1st Row: A. Sen, Dipali Sinha, Alahi, S. K. Choudhary (Jt. Secy., Social and Drama), Chandraprova Gulati, Kanchan Gulati, Meenakshi Roy, Mukul Ganguli, Subha Chakravarty, Dipanwita Dutt, Sonali Gupta, Manika Moulik, Kalpana Sen Barat, S. Goutam, K. Bose, M. Chakraborty.

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